



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

[REDACTED]

Sang L.,¹
Complainant,

v.

Kevin K. McAleenan,
Acting Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 0120181792

Agency No. HSTSA008982017

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated April 10, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Transportation Security Officer, SV-1802, G-Band at the Agency's Los Angeles International Airport facility in Los Angeles, California. On March 18, 2017, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Caucasian), color (Fair), and age (48) when he was issued him a Letter of Guidance and Direction (LOG). Complainant received the LOG for allegedly failing to inform his managers about an x-ray machine that became inoperable. The LOG was never included in his official personnel file.

After an investigation, Complainant was advised that he had the right to a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. Subsequently, the Agency filed a motion with the AJ requesting that the complaint be

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.

dismissed on the grounds that Complainant was not aggrieved, and, therefore, his allegation failed to state a claim.

On December 4, 2017, the AJ granted the Agency's motion finding that Complainant was not aggrieved by the LOG. As stated by the AJ, the LOG has:

[n]ever been part of his OPF and was not grievable. The LOG is not in the nature of a disciplinary action; it cannot be counted as a prior offense in determining future discipline. The sole purpose of the letter was to place Complainant on notice that future misconduct could result in a disciplinary action. Specifically, the LOG advised Complainant that "any future incidents of misconduct may result in disciplinary action, up to and including removal from the Federal service." ROI at 96. The LOG did not state however, that the written guidance could be used as a prior offense or that Complainant would be disciplined if he again engaged in similar conduct. The warning was of a general nature to remind Complainant that incidents of misconduct could result in discipline.

The Agency issued a final order that adopted the AJ's decision. The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.107(a) provides, in relevant part, that an agency shall dismiss a complaint, or portion thereof, that fails 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; § 1614.106(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. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). Pursuant to 29 C.F.R. § 1614.109(b), an Administrative Judge is empowered to dismiss complaints pursuant to 29 C.F.R. § 1614.107(a).

Upon review, we find that the AJ appropriately dismissed Complainant's complaint because he did not suffer a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Unlike the cases he cited on appeal and before the AJ, the LOG that Complainant received was not disciplinary in nature, nor could it be used in the future as a basis for discipline. Merely warning Complainant of the consequences of engaging in future misconduct does not mean that the LOG itself could be used as a basis for those consequences.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order.

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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

August 13, 2019
Date