



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

[REDACTED]
Elias R.,¹
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 2019005422

Agency No. ARFTWAIN19MAR01768

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 11, 2019, dismissing a formal 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.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a DA Intern-Installation Management Specialist, 0301, GS 7 at USGA - Alaska in Fort Wainwright, Alaska.

According to the Agency, on April 24, 2019, Complainant filed a formal complaint claiming that the Agency discriminated against him based on race, national origin, sex, color, and in reprisal for prior protected EEO activity. The formal complaint was comprised of numerous claims which the Agency identified as claims (a) through (s).

On June 11, 2019, the Agency issued a final decision. The Agency dismissed the formal complaint pursuant to 29 C.F.R. § 1614.107(a)(2), finding that the formal complaint was untimely filed. The Agency reasoned that Complainant received the Notice of Right to File a Formal Complaint (Notice) on March 28, 2019.

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.

The Agency found, however, that Complainant did not file his formal complaint until April 24, 2019, which it determined was well beyond the 15-day filing period.

The Agency alternatively dismissed claims (b), (c), and (h), pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. As summarized by the Agency, Complainant alleged in these three claims that he was discriminated against when:

- b. on February 22, 2019, a responsible management official (“RMO1”) allegedly emailed Complainant several times and then went to Complainant’s office asking to meet with Complainant. Complainant allegedly requested legal representation, and RMO1 allegedly denied Complainant’s request;
- c. on February 20, 2019, Complainant alleged that he asked for legal representation during his performance review with a responsible management official (“RMO2”) and RMO2 allegedly stated that Complainant did not have a right to legal representation;
- h. on or about January 23, 2019, Complainant alleges harassment when the first dispatcher met him with yelling and Complainant was allegedly hit on the hand.

The instant appeal followed. On appeal, Complainant argues that he timely filed his formal complaint. Complainant explains that he received the Notice on April 8, 2019, not on March 28, 2019. Complainant further argues that he submitted a formal complaint on April 11, 2019 which was received by the Agency on April 12, 2019, and not on April 24, 2019. In support of his assertions, Complainant submits copies of mail tracking confirmations indicating the date he received the Notice and the date the Agency received his formal complaint.

ANALYSIS AND FINDINGS

Untimely Formal Complaint

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an Agency shall dismiss a complaint which fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.106, which, in turn, requires the filing of a formal complaint within fifteen (15) days of receiving notice of the right to do so.

Our review of the record indicates that Complainant timely filed his formal complaint. The Notice included in the record is dated March 28, 2019, but there is no mail receipt confirmation to support that this Notice was received by Complainant on the same day that was dated. Additionally, the Agency does not provide a mail confirmation in the record to support that Complainant’s formal complaint was received on April 24, 2019. However, the record includes a mail receipt indicating that a document was issued to Complainant on March 28, 2019 and the document was received by Complainant on April 8, 2019.

These dates corroborate Complainant's assertion that he did not receive the Notice until April 8, 2019. Additionally, the record includes a mail receipt indicating that Complainant issued, by overnight delivery, a document to the Agency which the Agency received on April 12, 2019. These dates corroborate Complainant's assertion that he mailed his formal complaint on April 11, 2019 and his formal complaint was received by the Agency on April 12, 2019, and not on April 24, 2019 as the Agency contends. We note that the record does not contain any evidence of a mail confirmation dated March 28, 2019 or April 24, 2019. Absent documentation stating to the contrary, we find that Complainant received the Notice on April 8, 2019 and timely filed his formal complaint which was received by the Agency on April 12, 2019. Therefore, we find that Complainant timely filed his formal complaint within fifteen days of receiving the Notice.

Failure to State a Claim – (Claims (b), (c), and (h))

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief. The trier of fact must consider all of the alleged harassing incidents and remarks and considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

Claims (b), (c), and (h) were improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1), on the alternative grounds of failure to state a claim. A review of Complainant's formal complaint indicate that he alleges that he was subjected to "ongoing harassment." Among other alleged incidents, Complainant alleges in his formal complaint that he was denied legal representation during his performance review, was yelled at when he refused to meet with management privately and was subsequently terminated from the Agency because of his refusal to meet with management privately. Complainant further alleges that the Human Resources Director issued emails to Complainant's supervisor to harm Complainant's reputation, "lunged at and hit" Complainant, joked that Complainant was a "Good N---er," and was the management official who sent Complainant his termination letter. Complainant also alleges that he was subjected to sexual harassment by the Director who also allegedly yelled at him so loudly that others in the office could hear. When viewing all of Complainant's claims collectively, including three claims at issue, Complainant has set forth an actionable claim of harassment. We find that these alleged incidents are sufficiently severe or pervasive to set forth an actionable claim of harassment. Therefore, we do not find that the claims (b), (c) and (h) fail to state a claim and the Agency erred in dismissing these matters on this basis. A review of all the raised claims, including these three expressly dismissed by the Agency, reflects that Complainant has alleged an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

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 (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).

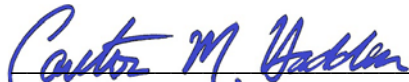
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

November 6, 2019

Date