



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

Dalton C.,¹
Complainant,

v.

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

Appeal No. 2019005888

Agency No. ARCESAC19MAY02047

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 10, 2019, 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

During the period at issue, Complainant worked as a Biological Science Study Manager at the Agency's U.S. Corps of Engineers, Sacramento District in Sacramento, California.

On June 26, 2019, Complainant filed the instant formal complaint. Complainant claimed that he was subjected to harassment/a hostile work environment on the bases of national origin, sex, age, and in reprisal for prior EEO activity when:

1. in or around August 2018, the Section Chief failed to obtain funding for South Sacramento County Steams Biological Assessment;

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. in or around August 2018, the Section Chief gave the impression that Complainant was working on the South Sacramento County Streams Biological Assessment past the deadline and start of the new rating period of April 1, 2018;
3. on or about April 30, 2019, the Acting Chief, Environmental Analysis Section, issued Complainant his Civilian Performance Plan, Progress Review(s), and Appraisal, finding his performance was unacceptable in two critical performance elements;
4. on or about May 29, 2019, the Acting Chief notified him that he would be placed on a Performance Improvement Plan (“PIP”);
5. in or around May 2019 or June 2019, the Acting Chief prevented him from being able to fulfill a requirement of his PIP when the Environmental staff of the Department of Water Resources asked him to coordinate with the Acting Chief and the Project Manager, and requested the Agency for concurrence with changing the title of the environmental document to an Environmental Assessment/Environmental Impact Report (“EA/EIR”) and contracting out this work;
6. on or about June 3, 2019, the Acting Chief prevented him from fulfilling a requirement of his PIP when she failed to contact the sponsor (Department of Water Resources);
7. in or around June 2019, the Acting Chief prevented him from fulfilling a requirement of his PIP when she did not acknowledge his new tasks as he had scoped and sent to her on June 6, 2019;
8. on or about June 13, 2019, the Acting Chief changed his role in the Environment Assessment/Initial Study so that he could no longer co-author the document;
9. on or about June 17, 2019, the Acting Chief inquired of his status of Environmental Assessment;
10. on or about June 17, 2019, the Acting Chief accelerated the draft schedule for the Environmental Assessment and created a scope without properly coordinating it; and
11. on or about June 18, 2019, the Acting Chief hindered his ability to obtain more funding for the Environmental Assessment/Environmental Impact Report when she ordered Complainant to continue work on the Environmental Assessment/Initial Study without her consulting upper management first and Department of Water Resources per their request.

In its July 10, 2019 final decision, the Agency dismissed the instant formal complaint on the grounds that the subject claims have not been raised with an EEO Counselor and that these claims are not like and related to matters for which Complainant underwent EEO counseling, pursuant to 29 C.F.R. § 1614.107(a)(2).

Specifically, the Agency determined that on June 4, 2019, the EEO Counselor conducted the initial interview in which Complainant alleged that he was discriminated against on May 29, 2019, when he was placed on a Performance Improvement Plan (PIP).

The instant appeal followed.

ANALYSIS AND FINDINGS

The Agency claimed that the formal complaint should be dismissed because it was not raised before the EEO Counselor. We note, however, that pursuant to 29 C.F.R. § 1614.106(d), a complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related in the formal complaint. While 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint that raises a matter that has not been brought to the attention of an EEO Counselor and is not like or related to a matter that has been brought to the attention of an EEO Counselor, we find that such a provision does not apply in this case. A fair reading of the instant record reflects that Complainant alleged that he was being subjected to ongoing harassment by various Agency officials. In addition, the formal complaint contains additional examples of alleged harassment by the same Agency officials which are like or related to the instances alleged in the informal complaint. Therefore, we find that the Agency improperly dismissed the formal complaint on the grounds that this matter has not been raised with an EEO Counselor and that it is not like or related to the matters for which Complainant underwent EEO counseling.

We REVERSE the Agency's final decision dismissing Complainant's formal complaint, defined herein as a harassment claim, 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 claim (harassment/hostile environment) 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 (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)

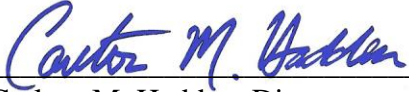
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 15, 2019

Date