



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

████████████████████  
Willie P.,<sup>1</sup>  
Complainant,

v.

Richard V. Spencer,  
Secretary,  
Department of the Navy,  
Agency.

Appeal No. 2020000309

Agency No. DON-19-00250-02468

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated August 15, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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 Buyer at the Agency's Naval Exchange Service Command (NEXCOM) in Virginia Beach, Virginia.

On March 23, 2019, Complainant initiated EEO Counselor contact. Informal efforts to resolve his concerns were unsuccessful.

On July 16, 2019, Complainant filed the instant formal complaint. Complainant claimed that the Agency subjected him to discrimination based on disability, age and in reprisal for prior EEO activity when from February 2019 through March 21, 2019, the following incidents occurred:

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<sup>1</sup> 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.

1. on or about March 21, 2019, in a private meeting with his General Merchandise Manager, he was advised that he have not had a strategy in five years and that this would be made a performance issue. In addition, the following incidents occurred between February 2018 and March 2019:
  - a. during his medical leave beginning February 2018, he was not permitted to use his laptop or work email;
  - b. in May 2018, upon his return, he was aside if he was 100% ready to resume duty;
  - c. on October 30, 2018, he was asked in an elevator conversation why he did not use his cane at a recent meeting, and the comment was made “I thought you were better;”
  - d. on or about September 2018, it was reported to Human Resources (HR) that he may have violated a non-disclosure agreement. On October 16, 2018, he was advised that HR would take no action because it was determined no violation took place;
  - e. in March 2019, management officials advised him that he had failed to provide strategies to the Vice President and he was advised to work with his supervisor and financial planner to produce these strategies; and
2. he was treated differently by management officials when on March 21, 2019, he was advised that he should “consider retirement.”

In its August 15, 2019 final decision, the Agency dismissed claims 1.a. – 1.d. for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency determined that Complainant’s initial EEO Counselor contact was on March 23, 2019, which it found to be beyond the 45-day limitation period regarding these claims.

Further, the Agency dismissed claims 1.a. – 1.e. and 2 for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1), finding Complainant was not aggrieved.

The instant appeal followed.

### ANALYSIS AND FINDINGS

#### *Claims 1.a. – 1.e. and 2 (failure to state a claim)*

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an Agency shall dismiss a complaint 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, .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).

The Agency improperly dismissed claims 1.a. – 1.e. and 2 for failure to state a claim. The formal complaint and the related EEO counseling report indicate that Agency erred in its constricted definition of Complainant's claims. A more accurate definition of the claim is one of an ongoing pattern of disability, age, and reprisal harassment of which the seven incidents addressed in the Agency's dismissal were but examples. Complainant also claimed that he felt the General Merchandise Manager's actions began on February 16, 2018, when he went on approved medical leave "this line of business was in good order, but during the leave performance in the department declined by 20%. [General Merchandise Manager] was directly responsible for the overall line management in his absence. Upon his return, in May of 2018, [General Merchandise Manager] indicated that he would be held accountable for this decline in performance, despite the fact that decisions made during his time were out of his control."

By alleging such a pattern of harassment, Complainant has stated a cognizable claim under the EEOC regulations. See Cervantes v. United States Postal Service, EEOC Request No. 05930303 (November 12, 1993).

*Untimely EEO contact (claims 1.a. – 1.d.)*

The Agency also improperly dismissed claims 1.a. – 1.d. on the grounds of untimely EEO Counselor contact. Complainant initiated EEO Counselor contact on March 23, 2019. The Commission has held that "[b]ecause the incidents that make up a hostile work environment claim collectively constitute one unlawful employment practice, the entire claim is actionable, as long, as at least one incident that is part of the claim occurred within the filing period. This includes incidents that occurred outside the filing period that the [Complainant] knew or should have known were actionable at the time of their occurrence." EEOC Compliance Manual, Section 2, Threshold Issues at 2 – 75 (revised July 21, 2005) (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002)).

The various incidents comprising Complainant's hostile work environment claim occurred within the 45-day time period preceding Complainant's March 23, 2019 EEO Counselor contact, as discussed above. Because the record reflects that the matters which the Agency identified in claims 1.a. – 1.d. are part of that harassment claim, we find that the Agency improperly dismissed these claims on the grounds of untimely EEO Counselor contact.

### CONCLUSION

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 work environment) 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

December 17, 2019

Date