



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

[REDACTED]

Ian G.,¹
Complainant,

v.

Michael R. Pompeo,
Secretary,
Department of State,
Agency.

Appeal No. 2019005132

Agency No. DOS-0311-19

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 9, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked at the U.S. Agency for International Development.

On May 17, 2019, Complainant filed a formal EEO complaint alleging that the Department of State (hereinafter referred to as “the Agency”)² discriminated against him on the bases of race (Asian), sex (male), national origin (Kashmir), religion (Islam), disability (Obsessive Compulsive Disorder (OCD) and Fibromyalgia), and reprisal for prior protected EEO activity when:

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 The Agency conducted a security awareness program identified as the Foreign Affairs Counter Threat (FACT) training.

1. in March and April 2019, the Agency denied Complainant reasonable accommodation for the FACT course, and
2. in April 2019, the Bureau of Diplomatic Security (BDS) and the Agency subjected Complainant to hostile work environment harassment during the FACT course. Complainant alleged that he was repeatedly subjected to inappropriate “epithets and derogatory stereotypes.”

In his EEO complaint, Complainant stated “Counseling requested but not conducted.”

In a July 9, 2019 final decision, the Agency dismissed Complainant’s complaint pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency reasoned that, “[Complainant d]id not go through EEO Counseling” because his allegations of discrimination were not first discussed with an EEO Counselor. The Agency stated that the assigned Counselor attempted to engage Complainant multiple times (via email and telephone) but was unable to do so. The Agency noted that the Counselor issued the Notice of Right to File (NORF) on May 15, 2019.

The instant appeal from Complainant followed. On appeal, Complainant stated that although he initiated contact with the Agency’s EEO office on April 10, 2019, no counseling or initial/final interview took place and he informed the EEO Counselor that he would be overseas for an extended period. Also, Complainant stated that he learned that the Counselor issued a counseling report on May 17 and June 12, 2019, and the Agency only provided him the second report initially. Further, Complainant stated that the Agency misapplied the standard for dismissal under 29 C.F.R. § 1614.107(a)(2), and failed to conduct EEO counseling as required under federal regulations. Complainant stated that he raised his issues with an EEO Counselor in a timely manner.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides, in pertinent part, that an Agency shall dismiss a complaint or a portion of a complaint that raises a matter that has not been brought to the attention of Counselor and is not like or related to a matter that has been brought to the attention of a Counselor. The record shows that Complainant initiated EEO contact on April 10, 2019. Complainant stated that he did not receive an initial or final interview or counseling to attempt to resolve the matter informally. The assigned Counselor stated that she could not engage Complainant to conduct counseling. Therefore, the Counselor issued the NORF on May 15, 2019 and Complainant filed a formal complaint on May 17, 2019.

We find, contrary to the Agency decision, Complainant raised the instant issues with an EEO Counselor even though no actual counseling sessions occurred. Complainant was given the right to file formally, which he did.

The Commission has held “[an A]gency has the burden of providing evidence and/or proof to support its final decisions.” Ericson v. Dep't of the Army, EEOC Request 05920623 (Jan. 14, 1993); see also Gens v. Dep't of Defense, EEOC Request No. 05910837 (January 31, 1992). The Commission finds that the Agency failed to fulfill its burden in the instant case. After careful review of the record, the Commission finds that the Agency's dismissal pursuant to 29 C.F.R. § 1614.107(a)(2) was improper.

CONCLUSION

We REVERSE the Agency's final decision dismissing the instant complaint and REMAND the matter to the Agency for further processing consistent with this decision and 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).

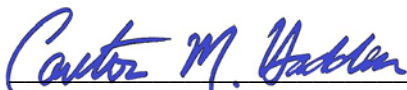
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

January 8, 2020
Date