



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

[REDACTED]
Fredrick A,¹
Complainant,

v.

James N. Mattis,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 0120182649

Hearing No. 510-2016-00448X

Agency No. DD-FY15-125

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 18, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Music Teacher, AD-1710-13, at the Agency's Antilles High School in Fort Buchanan, Puerto Rico.

On January 13, 2016, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (African-American), national origin (American), and reprisal when, on August 24, 2015, the Assistant Superintendent issued Complainant a 3-day suspension effective August 31, 2015.

The matter was investigated and Complainant requested a hearing. The EEOC Administrative Judge (AJ) dismissed the complaint concluding Complainant untimely filed his formal

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.

complaint. The AJ found that the notice of right to file was sent on December 22, 2015, and was presumed to have been received by Monday, December 28, 2015. Thus, the AJ found that Complainant's formal complaint, filed on January 13, 2016, was one day late. The Agency adopted the AJ's dismissal of the complaint.

The instant appeal followed. In his appeal, Complainant's attorney states that he was out of his office from December 23, 2015, to January 2, 2016, so the complaint was timely.

ANALYSIS AND FINDINGS

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 the notice of the right to do so.

The record discloses that the notice of right to file, dated December 22, 2015, was sent by the Agency by mail to Complainant's attorney's address of record. The notice stated that the formal complaint had to be filed "**within 15 calendar days after receipt of this notice**" [emphasis in the original]. The record establishes that the formal complaint was filed on January 13, 2016, as indicated by the postmark on its express mail envelope. The record contains no evidence indicating when the attorney received the mailed notice.

In dismissing the complaint, the AJ relied on a presumption of receipt of the notice within five days of its mailing, reasoning that the notice was mailed on December 22, 2015, and delivered by no later than Monday, December 28, 2015. Therefore, the AJ concluded that the complaint was filed one day late on January 13, 2016.

However, there is no authority, either in the regulations or even on the face of the notice itself, for the AJ to apply a presumption that the notice was received within five days of its mailing. Rather, evidence of receipt is required to commence the filing period. See Cortes v. United States Postal Service, EEOC Appeal No. 0120090669 (May 14, 2009). As already noted, the record contains no evidence as to when Complainant's attorney received the notice. Accordingly, we find that the formal complaint was timely filed on January 13, 2016, and the complaint was dismissed in error.

The Agency's final decision dismissing Complainant's complaint is REVERSED and the matter is REMANDED is set forth below.

ORDER

Within thirty (30) days of the date of this decision, the Agency shall send a written request for a hearing on the complaint, accompanied by a copy of this decision and the complaint file, to the appropriate EEOC Hearings Unit. A copy of the hearing request shall be provided to the Compliance Officer as indicated below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

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)

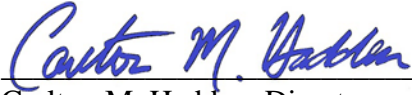
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 29, 2018

Date