



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

[REDACTED]
Christopher M,¹
Complainant,

v.

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

Appeal No. 2019000796

Hearing No. 430-2017-00102X

Agency No. 16-67856-01628

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 29, 2018, implementing the dismissal order of an Administrative Judge (AJ) regarding a formal complaint of unlawful employment discrimination in violation of 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 Training Specialist at the Agency's Camp Lejeune in North Carolina.

On April 4, 2016, Complainant initiated EEO Counselor contact. Informal efforts at resolution were not successful.

On June 1, 2016, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of age and in reprisal for prior protected EEO activity.

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.

By letter dated June 29, 2016, the Agency determined that the formal complaint was comprised of the following claims:

Was the Complainant discriminated against on the basis of age and subjected to harassment when the followings occurred:

1. On July 7, 2015, an Agency official (A1) failed to provide [Complainant] with clear job expectations after expressing human resource concerns:
2. On July 20, 2015, [A1] scolded the [Complainant] for “throwing him, under the bus’ and by not supporting his decisions,”
3. On July 22, 2015, [A1] told [Complainant] either “get on board or get the fuck out” and “I do not need here.”
4. On July 23, 2015, [A1] told [Complainant] “your behavior during the last two weeks is that of a person who is trying to usurp authority”
5. On July 27, 2015, [an Agency official (A2)] directed [Complainant] to move from building M-324 to another physical work location.
6. On July 28, 2015, [A1] told [A2] that [Complainant] ‘needs experience and can teach FSMC (Formal School Managers Course)’;
7. On September 3, 2015, [Complainant] reported ‘poor leadership, poor command climate and ongoing harassment’ to the Marine Corps Combat Support and Supply School (MCCSSS).
8. On September 4, 2015, [A2] sent [Complainant] a text asking him to ‘move to another empty office.’
9. On September 7, 2015, [A2] sent [Complainant] a text asking him ‘did you get my text?’
10. On September 30, 2015, [A1] left [Complainant] a voice mail asking him to ‘call him when he returns to work tomorrow;’
11. On September 30, 2015, [A21] told [Complainant] ‘a time clock will be installed to monitor civilian employee physical activity;’
12. On February 29, 2016, [Complainant] was forced to retire.

The Agency dismissed the basis of reprisal. However, the Agency accepted for investigation the claims, on the basis of age. Upon completion of the investigation. Complainant requested a

hearing before an EEOC AJ. The Agency filed a Motion to Dismiss on March 26, 2018. Complainant objected to the Agency's motion.

In an Order of Dismissal, dated August 7, 2018, the AJ dismissed the formal complaint for untimely EEO Counselor contact. The AJ reasoned "until 2016, the Commission has consistently held that the effective date of a resignation or retirement is the accrual date for a constructive discharge claim, and that contacting an EEO Counselor within 45 days of such an effective date is considered timely...However, the Supreme Court recently clarified the statute of limitations for a constructive discharge claim...in holding that a constructive discharge claim accrues and the limitations period begins to run when the employee gives notice of his resignation, not on the effective date of the resignation. Green v. Brennan, 136 S.Ct. 1769, 1782 (2016)."

The AJ further found that Complainant's claim accrued around "January 20, 2016, when Complainant provided notice of his impending retirement, but no later than January 2[7], 2016,² when he signed a [Standard Form 52] for his retirement." AJ Decision at 8. Thus, the AJ found that Complainant's initial EEO Counselor contact on April 4, 2016 was untimely.

The Agency issued a final order dated August 29, 2018, implementing the AJ's Order of Dismissal.

The instant appeal followed.

ANALYSIS AND FINDINGS

We find that the AJ properly dismissed Complainant's complaint for untimely EEO Counselor contact. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

EEOC Regulations provide that the agency or the Commission shall extend the time limits when the individual shows that he was not notified of the time limits and was not otherwise aware of them, that he did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he was prevented by circumstances

² We note that the AJ, in her decision, listed January 29, 2016, as the date Complainant signed the SF 52. However, the record reflects that Complainant signed the SF-52 on January 27, 2016.

beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

The AJ properly reasoned that the United States Supreme Court addressed the matter of when the limitation period begins to run on a constructive discharge claim in Green v. Brennan, 136 S.Ct. 1769 (2016). In Green, the Court held that “a constructive discharge claim accrues-and the limitation period begins to run-when the employee gives notice of his resignation, not on the effective date of that resignation.” See id. at 1782.

In the instant matter, the record reflects that Complainant informed Agency management of his retirement plans on January 19 or January 20, 2016. The record contains an email from the Civilian Personnel Director dated May 18, 2016. Therein, the Personnel Director states that Complainant’s supervisor notified him on January 19 or January 20, 2016, that Complainant intended to retire with an effective date of February 29, 2016. The record also contains a Request for Personnel Action Form regarding Complainant’s retirement indicating “[e]mployee requests voluntary retirement from the Federal Service effective [February 29, 2016] due to repeated harassment and discrimination over a seven-month period.” The form is signed by Complainant and dated January 27, 2016.

In the instant complaint, Complainant is alleging that he was subjected to a hostile work environment which culminated in his constructive discharge/forced retirement. Under the Supreme Court’s holding in Green, the limitations period for the instant matter does not begin to run on Complainant’s constructive discharge claim on the effective date of the action, February 29, 2016. Rather, the limitation period begins to run on the date Complainant gave notice of his resignation. Thus, even if we were to consider January 27, 2016, the date Complainant signed the Request for Personnel Action form, to be the date he gave notice of his resignation, Complainant’s EEO contact on April 4, 2016 was untimely.

We further find that the AJ properly addressed in her decision Complainant’s arguments that his EEO contact should be found timely. For example, Complainant argued below that the time period should be extended because he did not know until February 29, 2016, that his discrimination claims had merit. The AJ, in her decision, properly determined that “[t]he record indicates that Complainant filed a complaint with the Commander Inspector General (CIG) on November 2, 2015, ...and the CIG provided its findings to Complainant on February 29, 2016. While Complainant’s assertion indicates his belief that he had to exhaust non-EEO administrative remedies prior to pursuing EEO administrative remedies...Complainant cites to no law, regulation, or case law that would support his argument. Further, the Commission has consistently held that the utilization of agency procedures...and other remedial processes does not toll the time limit for contacting an EEO Counselor.” AJ Decision at 6. The AJ also properly found that “CIG’s finding about poor command climate had no bearing on Complainant’s discrimination claim and fails to meet the ‘reasonable suspicion’ standard in determining the accrual date for Complainant’s complaint.” AJ Decision at 8.

Accordingly, we AFFIRM the Agency's final order implementing the AJ's Dismissal Order which dismissed Complainant's complaint for untimely EEO Counselor contact.³

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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action,

³ Because we affirm, the Agency's final order for the reason set forth herein, we need not address the Agency's alternate dismissal of the basis of reprisal.

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. If you file a request to reconsider and also file a civil action, **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

February 26, 2019

Date