



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

[REDACTED]
Alvina S.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Eastern Area),
Agency.

Appeal No. 2019002102

Agency No. 4C000000118

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated January 24, 2019, dismissing her 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

At the time of events giving rise to this complaint, Complainant worked as a Manager, Human Resources, EAS 24, at the Agency's Eastern Area facility in Buffalo, New York.

On December 27, 2018, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Caucasian), sex (female), and age with respect to career opportunities when: (1) on May 15, 2018, the Agency issued her a Letter of Warning, dated May 4, 2018, for Improper Conduct; (2) on April 28, 2018, the WNY District Manager was appointed to that position, and, on July 31, 2018, it was announced that her trailing spouse was reassigned to the position of Eastern Area Learning Development and Diversity Specialist, EAS-23, effective August 4, 2018; (3) between June 12, 2018 and June 27, 2018, three position vacancies for the Employee Engagement Ambassador position were posted which

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.

Complainant would have applied for, but for the fact that the postings failed to indicate that consideration for an alternative domicile location would be given; (4) between June 26, 2018 through July 11, 2018, a vacancy for an Eastern Area Learning Development and Diversity Specialist, EAS-23 position was posted, domiciled in Pittsburgh, Pennsylvania, that did not include consideration for an alternative domicile location; and (5) on July 21, 2018 another employee was non-competitively selected for the position of Eastern Area Employee Engagement Ambassador, ES-23, in Buffalo, New York, and the position was newly created and not advertised or posed for application or consideration of any other employee. She further alleged that all executive and managerial selections made during the tenure of the current managers show an ongoing pattern of preferential appointments and selections, noting multiple selections.

Complainant alleged that the Agency knew that she wanted a non-supervisory position domiciled in in the Western New York District. Due to personal reasons, she was unable to relocate and would not apply for positions outside of her geographical area. She asserted that she would have been more than qualified for any of the positions at issue, but the Agency manipulated postings, had “non-postings,” changed domiciles, extended opportunities, etc. in ways that resulted in the denial of any opportunity for her to be consideration for any of the positions.

The Agency defined Complainant’s complaint as alleging discrimination on the bases of race, sex, and age when (1) on May 15, 2018, she was issued a Letter of Warning; and (2) on dates not specified, a trailing spouse was given a position and she believed the position should have been posted for her to apply for. The Agency dismissed both claims. It dismissed claim (1) pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO counselor contact. It dismissed claim (2) pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim.

The instant appeal followed. On appeal, Complainant asserts that the Agency incorrectly framed her issues. She submits a timeline describing the alleged discrimination based on race, gender, and age that negatively impacted her career opportunities. She notes specific examples of positions that were created in or posted as being in one location (outside of the Western New York area) that subsequently were reassigned to Western New York, for which she was qualified and would have applied, had the location been not been manipulated.

Regarding timeliness, she initially contacted the EEO counselor on September 7, 2018 and asserts that the hiring of a trailing spouse was announced on July 31, 2018, effective August 4, 2018. She became aware of this information on July 31, 2018. Regarding her other allegations, the Engagement Ambassador positions were posted from June 12 to 27, 2018 and the Eastern Area Learning Development and Diversity Specialist position was posted from June 26, 2018 through July 11, 2018. Thus, she her complaint was submitted within the 45-day time limit.

The Agency has not submitted a brief or statement in response.

ANALYSIS AND FINDINGS

Dismissal for Failure 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). When the complainant does not allege he or she is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

As an initial matter, we find that the Agency mischaracterized Complainant's claims regarding the position vacancies. Complainant is alleging that, in multiple instances, the Agency posted misleading vacancy announcements, including such things as failing to disclose that consideration for an alternative domicile location would be given, to discourage her from applying for positions; or, alternatively, acted secretly in not posting positions or otherwise selecting employees.

Generally, a complainant who claims discriminatory non-selection is not sufficiently aggrieved to state a valid claim when he has not applied for the position in question. See Owen v. Social Sec. Admin., EEOC Request No. 05950865 (Dec. 11, 1997). However, the Commission has found that, under certain circumstances, a complainant might be aggrieved by non-selection for a position for which she did not apply, where she demonstrates that the Agency discouraged her from applying or the application process was secretive. See Ozinga v. Dep't of Veterans Affairs, EEOC Request No. 05910416 (May 13, 1991). We find this to be the case here. Complainant's allegations that the Agency acted discriminately in discouraging her from applying or having secretive application processes are allegations of an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (April 21, 1994). Therefore, we find that the Agency's dismissal of the complaint pursuant to 29 C.F.R. §1614.107(a)(1), for failure to state a claim, was not appropriate.

We also note that Complainant's allegations extend beyond the single instance of hiring the trailing spouse and include multiple instances of alleged discouragement or secretive application and selection processes.

Dismissal for Untimely EEO Counselor Contact

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides, in pertinent part, that an agency shall dismiss a complaint that fails to comply with the applicable time limits contained in § 1614.105

unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor.

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 Agency dismissed Complainant's claim regarding the Agency's issuance of the Letter of Warning, dated May 15, 2018, for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2), because it was brought to the EEO Counselor after the expiration of the 45-day period. The record shows that Complainant first brought her complaint to an EEO counselor on September 7, 2018, which is beyond the 45-day time limit. The Commission has consistently held that a complainant must act with due diligence in the pursuit of her claim or the doctrine of laches may apply. See Becker v. United States Postal Service, EEOC Appeal No. 01A45028 (November 18, 2004) (finding that the doctrine of laches applied when complainant waited over two years from the date of the alleged discriminatory events before contacting an EEO Counselor); O'Dell v. Department of Health and Human Services, EEOC Request No. 05901130 (December 27, 1990). The doctrine of laches is an equitable remedy under which an individual's failure to pursue diligently his course of action could bar her claim. Complainant has not offered any explanation as to her untimeliness with respect to this claim. Thus, she has failed to provide sufficient justification for extending or tolling the time limit.

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED in part and REVERSED in part. The complaint is hereby REMANDED to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claim (concerning discouraging her from applying for positions or having secretive application processes) 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 (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 (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, 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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

May 21, 2019

Date