



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

[REDACTED]
Mitchell K.,¹
Complainant,

v.

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

Appeal No. 2019002360

Agency No. DON184215801773

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated December 12, 2018, dismissing a formal 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

During the period at issue, Complainant worked for the Agency as a Supervisory Welding Manager at the Norfolk Naval Shipyard in Norfolk, Virginia.

On or about October 20, 2017, Complainant learned that he was not selected for the Supervisory Training Instructor, GS-1712-13, position.

On October 23, 2017, Complainant submitted a Freedom of Information Act ("FOIA") request regarding the selection process for the Supervisory Training Instructor, GS-1712-13, position.

On March 22, 2018, Complainant received all of the documents associated with his October 23, 2017 FOIA request.

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.

On March 29, 2018, Complainant initiated EEO Counselor contact. Informal efforts to resolve his concerns were unsuccessful.

On July 17, 2018, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination in reprisal for prior protected activity when, on March 22, 2018, Complainant became aware through a Freedom of Information Act request that an Agency manager did not follow the proper promotion selection process, and inappropriately influenced the panel members in the selection of the Supervisory Training Instructor, GS-1712-13.

On November 20, 2018, the Agency issued the instant final decision. The Agency stated that the selection for the position at issue was formally announced on October 20, 2017, but that Complainant did not contact an EEO Counselor until March 29, 2018. The Agency determined that Complainant did not initiate contact with an EEO Counselor within the regulatory time frame of 45 days. The Agency found that the October 20, 2017 non-selection was a discrete action that would trigger the need to contact an EEO Counselor. The Agency stated that the time limit for seeking an EEO Counselor is when an individual is reasonably suspicious of potential discrimination, but not necessarily before all of the facts are apparent. The Agency dismissed the formal complaint for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2).

The instant appeal followed. On appeal, Complainant asserts that he initially contacted the Agency on October 23, 2017 to receive all documents pertaining the selection process for the position of Supervisory Training Instructor. Complainant asserts that at the time, he was not aware of the discriminatory factors involved in the selection process. Complainant asserts that it was not until he received all the documents in March 2018, that he had developed reasonable suspicion of the discriminatory action. Complainant therefore argues that it was not feasible to come to a reasonable suspicion until a sufficient amount of documentation was obtained and reviewed.

ANALYSIS AND FINDINGS

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.

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 beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. Ellis v. United States Postal Service, EEOC Request No. 01992093 (Nov. 29, 2000).

Upon review of the record, Complainant clearly indicated that he was aware of the Agency's decision not to select him as early as October 20, 2017. However, Complainant failed to contact the EEO Counselor until March 29, 2018. We find that Complainant reasonably suspected he was the victim of unlawful discrimination long before he sought counseling, and that the suspicion is what motivated him to file his FOIA request on October 23, 2017.

Complainant has not asserted that he was unaware of the EEO complaint process, or that he was unaware of the necessity for contacting an Agency EEO Counselor within 45-days of the alleged discriminatory event. Instead, Complainant argues that he could not have reasonably developed suspicions until his FOIA request was fulfilled. We are not persuaded. 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. Howard v. Dep't. of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until Complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

Moreover, the Commission has consistently held that use of internal agency procedures, union grievances, and other remedial processes does not toll the time limit for contacting an EEO Counselor. See Kramer v. United States Postal Service, EEOC Appeal No. 01954021 (October 5, 1995); Williams v. United States Postal Service, EEOC Request No. 05910291 (April 25, 1991); Ellis v. United States Postal Service, EEOC Request No. 01992093 (Nov. 29, 2000).

Here, Complainant waited past reasonable suspicion to seek counseling--instead waiting until he had gathered evidence through the FOIA system to support his claim. We therefore AFFIRM the Agency's dismissal of the complaint pursuant to 29 C.F.R. §1614.105(a)(2).

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:



Carlton M. Hadden, Director
Office of Federal Operations

April 30, 2019
Date