



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

██████████
Scarlet M,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2019005240

Agency No. 2004-0512-2019101959

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 3, 2019, dismissing a formal complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Licensed Practical Nurse, GS-6, in Baltimore, Maryland.

On May 29, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on disability and in reprisal for prior protected EEO activity.

On July 3, 2019, the Agency issued a final decision. The Agency determined that the formal complaint was comprised of the following claims:

1. In January 2019, Complainant was issued a 14-day suspension,² and

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 record reflects that the 14-Day Suspension was reduced to a 10-Day Suspension in the grievance process.

2. Whether Complainant was subjected to a hostile work environment based on disability and reprisal as evidenced by the following:
 - a) On an unspecified date, [a named Nurse Manager], made insulting comments about Complainant concerning her absenteeism in front of her peers.
 - b) On October 22, 2018, [a named Nurse Manager] contacted the Complainant telephonically during her day off inquiring about an incident at work.
 - c) In February 2019, [a named Nurse Manager] denied Complainant's request for FMLA.³

The Agency dismissed the formal complaint in its entirety on the grounds the formal complaint was untimely filed. The Agency reasoned that the Notice of Right to File (Notice) was sent to Complainant and Complainant's representative via email on May 13, 2019, but a formal complaint was not filed until May 29, 2019. The Agency stated that the formal complaint should have been filed by May 28, 2019. Specifically, in its final decision, the Agency stated "[o]n June 13, 2019, a Request for Additional Information regarding timeliness was sent to you via email. On June 13, 2019, your representative emailed a response to our office. [The representative] stated [the EEO Counselor] sent the [Notice] to both [herself] and [Complainant] on May 13. [The representative] opened and read the email on that date." Therefore, it is unreasonable for you as the Complainant's representative to have not been able to file the claim...within 15 days..."

The Agency also dismissed claim (1), the suspension, on the alternate grounds that Complainant raised this matter in the negotiated grievance process.

The instant appeal followed. On appeal, Complainant, through her representative, asserts that she did not receive adequate representation by the union in the grievance process. In addition, Complainant's representative asserts that at the time the Notice was sent, Complainant was in the hospital and did not have an opportunity to open and read the Notice.

³ The record reflects that Complainant is alleging that the Agency charged her with Absence Without Leave.

ANALYSIS AND FINDINGS

Dismissal for Untimely Formal Complaint

The Agency improperly dismissed the formal complaint on the grounds it was untimely filed. EEOC Regulation 29 C.F.R. § 1614.106(b) requires the filing of a written complaint with an appropriate agency official within fifteen (15) calendar days after receipt of the notice of the right to file a formal complaint. 29 C.F.R. § 1614.107(a)(2) provides that the agency shall dismiss a complaint that fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106, and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c).

The record reflects that an Agency's EEO Counselor sent Complainant and her representative the Notice of Right to File (Notice) via email on May 13, 2019. The email from the EEO Counselor provided, in pertinent part, that "[y]ou will have 15 days from when you open this email to return documents if you choose to file formal. If ORM has not received a confirmation/read receipt from you within 5 days, the [Notice] will automatically be considered as received and read. Once you have received your [Notice], please reply back to this email stating [Notice] received or acknowledged."

By email dated June 13, 2019, the EEO Counselor sent an email to Complainant and her representative inquiring as to the timeliness of the formal complaint. Complainant's representative responded that same day via email. The representative stated "[t]he email indicates that the [EEO Counselor] sent the [Notice] to both me and [Complainant] on May 13. I opened and read the email on that date but [Complainant] was not able to open and read the document until [May 15, 2019]."

The record does not contain a "read receipt" or other evidence indicating when Complainant actually opened the email. Where as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." See Guy v. Dep't of Energy, EEOC Request No. 05930703 (Jan. 4, 1994) (quoting Williams v. Dep't of Defense, EEOC Request No 05920506 (Aug. 25, 1992). In addition, in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decision. See also Gens v. Dep't of Defense, EEOC Request No. 05910837 (Jan. 31, 1992). In the instant matter, we find that the Agency has not met its burden.

Finally, while the Agency, in its final decision, found that Complainant's representative could have filed the formal complaint on behalf of Complainant by May 28, 2019, we note that Complainant's representative is not an attorney. Thus, the applicable time limitation begins to run from when *Complainant*, and not her non-attorney representative, received the Notice. 29 C.F.R. § 1614.605(d).

Dismissal of Claim (1) for Raising the Same Matter in the Negotiated Grievance Procedure

The regulation set forth at 29 C.F.R. § 1614.107(a)(4) provides that an agency may dismiss a complaint where the complainant has raised the matter in a negotiated grievance procedure that permits claims of discrimination.

While the record contains correspondence indicating that a grievance was filed on the suspension, the record does not contain a copy of the relevant provisions of the collective bargaining agreement. Thus, we are unable to determine whether the negotiated grievance process allows for claims of discrimination to be raised. See Irwin R. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120180492 (Feb. 15, 2018) (reversing Agency's dismissal for complainant having raised these matters in the negotiated grievance process reasoning that the record did not contain a copy of the collective bargaining agreement indicating whether it allowed for claims of discrimination to be raised).

For the reasons set forth herein, we REVERSE the Agency's final decision dismissing the formal complaint and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. 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

October 31, 2019

Date