



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

████████████████████
Kimberly H.,¹
Complainant,

v.

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

Appeal No. 2020000316

Agency No. DON-18-58400-01150

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final action dated September 12, 2019, implementing the dismissal of 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., and 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 as a Congressional Public Affairs Officer at the Agency's facility in Norfolk, Virginia. On March 20, 2018, Complainant filed a formal complaint, claiming that the Agency subjected her to discrimination on the bases of sex (female), disability, and in reprisal for prior protected EEO activity.

By letters dated April 17, 2018 and July 26, 2018, the Agency accepted some of Complainant's claims for investigation. Upon completion of the investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ).

On May 15, 2019, the Agency filed a Motion to Dismiss with the AJ, asserting that Complainant's formal complaint was untimely filed and should be dismissed in its entirety. On July 1, 2019, Complainant filed a response to the Agency's Motion.

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 August 14, 2019, the AJ granted the Agency's Motion to Dismiss. The AJ found that on March 1, 2018, Complainant sent a copy of the Notice of Right to File a Formal Complaint (Notice), which she received from the Agency, to her attorney at the time and thus Complainant's attorney came into possession of the Notice. The AJ therefore found that is when Complainant's attorney "received" the Notice and the time period for filing the formal complaint commenced. Using this reasoning, the AJ concluded that the formal complaint filed on March 20, 2018, was outside of the applicable 15-day time period.

On September 12, 2019, the Agency issued a final action implementing the AJ's Order Granting the Agency's Motion to Dismiss.

The instant appeal followed. Complainant, on appeal, requests that we reverse the AJ's dismissal and remand this matter for a hearing. Complainant's attorney asserts that the AJ erred in finding that the timeline for responding to the Notice was triggered when Complainant included her attorney on an email that contains the Notice from the Agency, before the attorney was actually served with the Notice from the Agency. The attorney asserts that this standard would render the practice of notification through counsel a meaningless exercise.

Complainant, through her attorney,² also asserts that the AJ erred in finding that the Agency met its burden in finding that Complainant's complaint was untimely filed. Complainant reasoned "the only evidence that the Agency produced in support of its dismissal is a copy of an email on which [Complainant's attorney at the time] was [included on]. Because the Agency did not produce a read receipt there is no evidence in the record that [Complainant's attorney at the time] opened the email prior to being served with the official correspondence by certified mail." Complainant's Brief at 12.

In response, the Agency requests that we affirm its final action implementing the AJ's Order of Dismissal. The Agency reasons that Complainant's attorney at the time was in receipt of the Notice on March 1, 2018, when Complainant emailed her attorney at the time a copy of the Notice. Thus, the Agency reasserts that the formal complaint filed on March 20, 2018, is not timely.

ANALYSIS AND FINDINGS

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).

² We note that Complainant's attorney who received the Notice is no longer representing Complainant. Complainant has a different attorney who represented her in response to the Agency's Motion to Dismiss and in the instant appeal.

Finally, 29 C.F.R. § 1614.605(d) provides that when a complainant is represented by an attorney, applicable time frames are computed from the attorney's (not complainant's) receipt of relevant documents.

The AJ erred in dismissing the formal complaint on the grounds that the formal complaint was untimely filed. Even assuming, without finding, that Complainant's attorney's receipt of the Notice emailed by Complainant (rather than receipt of the Notice sent by the Agency to Complainant's attorney) triggered the relevant 15-day timeframe, the record is devoid of evidence establishing when Complainant's attorney at the time actually "received" the email sent by Complainant. The Agency asserts, in response to Complainant's appeal, that Complainant originated the email containing the Notice to her attorney and that, therefore the Agency has no ability to produce a "read" receipt.

The record does, however, contain evidence that Complainant's attorney received the Notice sent by the Agency via certified mail on March 6, 2018. Thus, the filing of the formal complaint on March 20, 2018, would be timely using March 6, 2018 as the trigger date to commence the relevant 15-day time period.

When 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). We find that the Agency in the instant matter has not met its burden of establishing that Complainant's attorney received the Notice prior to March 6, 2018.

Accordingly, we REVERSE the Agency's final action implementing the AJ's Order Granting the Agency's Motion to Dismiss and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER

Within thirty (30) calendar days of the date of this decision, the Agency shall submit a renewed request for a hearing to the Hearings Unit of the EEOC's Charlotte District Office, along with a copy of the complete complaint file and a copy of this decision. The Agency shall provide written notification to the Compliance Officer as indicated below that the **hearing request and complaint file** has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge will issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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

December 17, 2019

Date