



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

[REDACTED]
Fernando K.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2024000878

Agency No. HS-TSA-01408-2023

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated September 27, 2023, dismissing his complaint alleging 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 as a Transportation Security Officer at the Daniel K. Inouye International Airport in Honolulu, Hawaii.

On June 28, 2023, Complainant filed a formal EEO complaint alleging that the Agency subjected him to discrimination based on disability.

In its final decision dated September 27, 2023, the Agency dismissed the formal complaint on the grounds it was untimely filed. Specifically, the Agency reasoned that Complainant and his non-attorney representative received the Notice of Right to File a Formal Complaint (Notice) via email on May 23, 2023, but did not file a formal EEO complaint until June 28, 2023, outside of the applicable time limit. The Agency stated as follows:

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 July 12, 2023, [the Agency] sent the union representative an email, requesting clarification, and notifying her that the complaint appeared to be untimely filed. On July 13, 2023, the union representative responded in writing, stating that she and Complainant received the [Notice] on May 23, 2023, and that they were aware of the fifteen-day timeframe. The union representative stated further that she was on vacation, and they delayed opening the email until June 13, 2023. Delaying filing the formal complaint because the union representative is on vacation is not adequate justification to warrant an extension of the regulatory time limit for filing the complaint. Final Agency Decision at 3.

The Agency's final decision also set forth that the formal complaint was defective because Complainant did not sign the complaint.

The instant appeal followed. On appeal, Complainant's requests that we reverse the Agency's final decision. Complainant asserts that the Notice was not opened until June 13, 2023 and that, therefore, his formal complaint filed on June 28, 2023 is timely. Complainant further states "we thought we had cleared this up with [a named EEO Counselor/Case Manager] as we had explicitly told her that we did not open the [Notice] until June 13, 2023."

In response, the Agency requests that we affirm its final decision dismissing Complainant's complaint. The Agency sets forth that failure to open the [Notice] does not constitute good cause to toll the time limit and cites to Bernice P. v. Dep't of the Treasury, EEOC Appeal No. 2023002022 (June 29, 2023). The Agency sets forth that in Bernice P.:

[t]he [a]gency dismissed her complaint for timeliness; on appeal, complainant argued both that the filing deadline should have been equitably tolled and that her filing was timely because it was within the 15 days of her *opening* the notice. In upholding the dismissal for untimely filing, the Commission agreed with the agency that complainant's failure to open the notice was insufficient to warrant tolling, noting that complainant could have contacted the agency for an extension but failed to do so. Additionally, the Commission noted that equitable tolling of deadlines is appropriate when a complainant is unaware or ignorant of his rights because the employer failed to give notice-something that was not the case for complainant." Agency Brief at 4 (internal citations omitted).

The Agency, in its response brief, further sets forth that Complainant failed to sign his formal complaint.

ANALYSIS AND FINDINGS

Dismissal on the Grounds the Formal Complaint 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).

We find that the Agency improperly dismissed the formal complaint on the grounds it was untimely filed. We acknowledge that the record contains an email from Complainant's non-attorney representative dated July 13, 2023. Therein, Complainant's representative asserts that she and Complainant received the Notice on May 23, 2023 but did not *open* the email until June 13, 2023. The representative stated that they were aware of the 15-day time limit but that she was on vacation and the formal complaint was filed on June 28, 2023, 15 days from opening the Notice.

We also acknowledge our decision in Bernice P. v. Dept. of Treasury, EEOC Appeal No. 2023002022 (June 29, 2023), cited by the Agency in its response brief. However, here, the record also contains the following documents submitted by Complainant on appeal which distinguishes this matter from the Bernice P. case. In an email from Complainant's representative to the Agency EEO Counselor dated June 26, 2023, the representative stated that they "opened" the Notice on June 13, 2023, but they are unable to complete the form and requested another formal complaint form. The EEO Counselor/Case Manager responded via email on June 26, 2023 and provided another complaint form. The EEO Counselor further stated "[i]f you *opened* the [Notice] on June 13, 2023, you have until...June 28, 2023 to file the formal complaint in order to be considered timely filed [emphasis added]."² Based on the Agency's EEO Counselor's assurances that Complainant's formal complaint would be deemed timely if he "opened" the Notice on June 13, 2023 and filed his formal complaint by June 28, 2023, we find Complainant's June 28, 2023 formal complaint to be timely filed.

Failure of Complainant to Sign the Formal Complaint

The Agency's final decision and response brief sets forth that Complainant's formal complaint was defective because Complainant did not sign it.

EEOC Regulation 29 C.F.R. § 1614.106(c) provides that a complaint must contain a signed statement from the person claiming to be aggrieved, or the person's attorney.

²The record reflects that Complainant "viewed" the Notice on June 13, 2023. Complaint File at 71.

Although the Agency received the instant formal complaint, the record reflects that it was not signed by Complainant. However, equitable considerations require that the Agency allow Complainant the opportunity to cure the defect in the formal complaint. See Pineda v. U.S. Postal Serv., EEOC Appeal No. 01940017 (Dec. 29, 1993). The record is devoid of evidence that Complainant was provided with the opportunity to cure this defect in the instant matter.

CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency is ORDERED to provide Complainant with the opportunity to cure the instant formal complaint as follows:

Within thirty (30) calendar days from the date this decision is issued, the Agency shall notify Complainant (and ensure Complainant receives such notification) that he has 15 calendar days from receipt of the Agency's notification to cure his formal complaint by reviewing the document and *providing his signature* on the document. Thereafter, the Agency shall have thirty (30) calendar days from the date of its receipt of Complainant's response or from the deadline Complainant has to respond (if Complainant does not submit a response) to either issue a final decision dismissing the complaint, with appeal rights to the Commission, or to notify Complainant it is accepting his formal complaint.

A copy of the Agency's notification letter to Complainant requesting his signed complaint and either a copy of the Agency's new final decision or letter accepting Complainant's complaint must be sent to the Commission as set forth in the section below entitled "Implementation of the Commission's Decision."

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 (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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

January 22, 2024

Date