



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Lilla B,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2024001751

Agency No. HS-CBP-01261-2023

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's December 11, 2023, dismissal of 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. For the reasons presented below, we REVERSE the Agency’s final decision and REMAND this matter to the Agency for further processing in accordance with the Order below.

ISSUE PRESENTED

Whether the Agency’s final decision properly dismissed Complainant’s formal complaint on the grounds of untimely EEO Counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2).

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Border Patrol Processing Coordinator, GS-6, for the Agency’s Rio Grande Valley Sector, Donna Texas Facility, in Donna, Texas.

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 June 22, 2023, Complainant filed a Formal EEO Complaint alleging discrimination by the Agency on the bases of national origin (Hispanic)² and sex (female) when:

1. Complainant was subjected to a hostile work environment, including the following events:
 - a. On or about November 15, 2022, Acting Watch Commander 1 falsely stated that Complainant was present at muster where he addressed the Agency's uniform and grooming policy,
 - b. On or about November 15, 2022, the Acting Supervisory Border Patrol Agent falsely alleged that Complainant advised him she could not remove her nose ring because she needed a special tool to do so,
 - c. On or about November 17, 2022, multiple members of management ordered Complainant to sign an On-the-Spot Field Observation Report for wearing a nose ring even though she was not wearing one,
 - d. On or about November 19, 2022, Acting Watch Commander 2 incorrectly accused Complainant of making a false statement regarding her nose piercing and ordered her to submit a memorandum addressing the reasons for the alleged false statement, and,
 - e. On or about November 23, 2022, Acting Watch Commander 2 ordered Complainant to sign a second Weingarten notice.
2. On or around January 11, 2023, Complainant received Notice of Termination from Employment during her one-year probationary period.

The Notice of Termination provided clear instructions for initiating EEO contact:

Should you choose to file an EEO complaint, you must seek EEO counseling from PDO within forty-five (45) calendar days of the effective date of the discipline or of the date you reasonably believed you were discriminated against. You can initiate EEO counseling by calling 1-877-MY-EEO-HELP (1-877-693-3643); by sending an email to: cbpeeocomplaintfiling@cbp.dhs.gov; or by contacting your servicing EEO Officer.

² Though Complainant alleged that she was subjected to discrimination on the basis of race (Hispanic), the Commission considers the term, "Hispanic" to be a description of an individual's national origin, not race. See Angela F. v. United States Postal Serv., EEOC Appeal No. 2019003846 (Feb. 4, 2020). Nonetheless, claims of race discrimination are analyzed under the same Title VII framework as claims of national origin discrimination.

The record reflects that on February 24, 2023, Complainant, through legal counsel, sent an email to cpbeecomplaintfiling@cbp.dhs.gov with the above-referenced claims, requesting informal EEO counseling. On March 30, 2023, Complainant, through counsel, re-sent the informal complaint, stating that she did not receive a response to her previous attempt. The Agency promptly replied that they did not receive the February 24, 2023 email because it was sent to “cpb instead of cbp” therefore, the Agency would consider March 30, 2023 the date of initial EEO contact.

The Agency dismissed the matter for untimely contact with an EEO Counselor pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency reasoned that Complainant was on notice of the 45 day limitation period to contact an EEO counselor, yet she did not make contact until March 30, 2023, which is 78 days after the most recent alleged discriminatory event. The Agency further reasoned that under the circumstances, tolling the time limitation period is not warranted because Complainant, when provided the opportunity, did not offer adequate justification for the delay. As support, the Agency cited the Commission’s decision in Latricia P. v. Department of Homeland Security, wherein, the Commission declined to toll the time limit where the complainant missed the 45 day limitation period because her attorney sent their initial EEO contact to the wrong email address. EEOC Appeal No. 2022003824 (Dec. 19, 2022), reconsideration denied EEOC Request No. 2023001563 (Jun. 26, 2023).

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant submitted a statement, *pro se*, with the procedural history for the instant complaint and a list of requested remedies. Complainant’s statement does not challenge (or address) the Agency’s rationale for dismissing her complaint for untimely EEO contact.

The Agency did not submit a statement or brief in opposition to Complainant’s appeal.

STANDARD OF REVIEW

The Agency’s decision to dismiss a complaint is subject to *de novo* review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission’s own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint’s allegations as true. See Cobb v. Dep’t of the Treas., EEOC Request No. 05970077 (Mar, 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint’s allegations must be made in favor of the complainant.

ANALYSIS

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 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

Personnel documentation in the record reflects that the effective date of Complainant's termination fell on January 11, 2023. Therefore, the last day Complainant could timely contact an EEO Counselor fell on February 27, 2023.³ Complainant's first successful attempt at EEO contact was on March 30, 2023.

Pursuant to 29 C.F.R. § 1614.604(c), an agency or the Commission shall extend the time limits when the individual shows that they were not notified of the time limits and were not otherwise aware of them, that they did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence they were prevented by circumstances beyond their control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

Complainant was aware of the time limit and how to initiate EEO contact. She was afforded an opportunity to justify the delayed contact in a questionnaire interview provided by the EEO Counselor. Complainant merely responded: "The email was sent by my Attorney to cbpeeocomplaintfiling@cbp.dhs.gov." When she provided this response, Complainant was aware of the typographical error as she was copied on the February 24, 2023 email and the March 30, 2023 email correspondence. Complainant's apparent refusal in both the EEO Counselor's Report and in her appellate brief, to acknowledge the error that clearly originated on her end gives the Commission pause. However, we find it appropriate to exercise our authority under 29 C.F.R. § 1614.604(c) and toll the time limit for this complaint. It is clear from the record that the delay was due to a clerical error, which the attorney promptly cured.

Attorney Mistake

The Commission has previously held that when provided with the proper address, filing at the wrong address does not constitute a proper filing. Latricia P., citing Meggitt v. United States Postal Serv., EEOC Appeal 01A40408 (Feb. 3, 2004) (formal complaint filed when sent to wrong address despite receipt of proper instructions), Pacheco v. United States Postal Serv., EEOC Request No. 05930700 (Sept. 10, 1993) (appeal untimely sent to wrong address).

The Commission has also held that tolling the time limit is justified if a filing is untimely due to a mistake by the complainant's attorney, where the attorney promptly corrects the mistake upon being made aware. See Complainant v. United States Postal Serv., Appeal No. 0120142668 (Nov. 13, 2014) (adequate justification to toll the time limit where attorney sent formal

³ This date accounts for the weekend, as the 45th day fell on Saturday, February 25, 2023.

complaint to the wrong agency prior to the filing deadline, then promptly filed with the correct agency after discovering the mistake) but see Justine R. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120180630 (Apr. 11, 2018) (complaint properly dismissed as untimely where the attorney submitted complaint before the deadline, but omitted the last character of the email address, so it did not reach the agency, the email did not bounce back nor did the recipient respond that it had been sent to the wrong address, however, neither the complainant nor her attorney followed up for 10 months, finding, the “prolonged lack of response to the Agency's silence indicates lack of due diligence” equitable tolling not justified).

Based on the circumstances of this particular complaint, we find that our rationale in Leticia P., which the Agency relied on in its dismissal, does not apply. In Leticia P., the complainant's attorney sent the informal complaint to the incorrect email address, then, when he did not receive a response, he sent another email to the same incorrect email address, as well as an email to a different incorrect email address. Here, Complainant's attorney attempted file an informal complaint using the correct email address, as the informal complaint specifies: “Via Electronic Mail: cbpeeocomplaintfiling@cbp.dhs.gov.” The email was not delivered due to a typographical error. Significantly, the error, transposing two similarly shaped letters within a relatively lengthy email address, is not apparent at first glance. There is no evidence to indicate that the attorney was aware of the error prior to March 30, 2023. The attorney exercised due diligence by following up one month after they did not receive a response from the Agency and by requesting confirmation of receipt in their second attempt.

Under the circumstances of this case, and pursuant to our authority under 29 C.F.R. § 1614.604(c), we find adequate justification to excuse Complainant's untimely EEO Contact with respect to the event in Claim 2. As it was not addressed by the Agency, we decline to determine whether Claim 1 states a timely claim of harassment.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED.

The complaint is hereby REMANDED to the Agency for further processing in accordance with this Decision and the Order below.

ORDER (E0224)

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, or a copy of the final agency decision (“FAD”) if Complainant does not request a hearing.

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 (M0124.1)

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 their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their 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 their 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(f).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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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 (M0124.1)

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).

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COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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 their 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

July 8, 2024
Date