



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

Gerard M.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2024001930

Agency No. ARAPG24NOV00331

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated December 14, 2023, dismissing his 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 following reasons, we AFFIRM the Agency's decision dismissing the complaint.

ISSUE PRESENTED

The issue presented is whether the Agency properly dismissed Complainant's EEO complaint for electing to pursue one of the claims with the Merit Systems Protection Board (MSPB) pursuant to 29 C.F.R. § 1614.107(a)(4) and for untimely EEO counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2).

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-0830-7 Mechanical Engineer at the Agency's Aberdeen Test Center facility in Aberdeen Proving Ground, Maryland.

Complainant initiated contact with an EEO counselor on November 20, 2023. On December 4, 2023, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (African American), sex (male), and religion (Islam) when:

1. On May 8, 2023, Complainant was terminated during his probationary period by the Chief of Staff;
2. On May 4, 2023, the Combat Systems Test Branch Chief repeatedly called Complainant to his office asking for work related information;
3. On May 2, 2023, a Test Officer repeatedly stopped at Complainant's cubicle requesting work related information; and
4. On March 29, 2023, an Administrative Assistant suddenly dropped her head down on Complainant's side of the desk with her mouth wide open.

On December 14, 2023, the Agency issued its final decision. The Agency found that the entire complaint was subject to dismissal pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact. The Agency noted that the May 8, 2023, Notice of Termination informed Complainant of the 45-day time limit to contact an EEO counselor and that Complainant did not provide any information showing that the time limit should be extended. The Agency also dismissed claim (1) pursuant to 29 C.F.R. § 1614.107(a)(4) because Complainant had elected to appeal his termination to the MSPB on June 7, 2023. On July 19, 2023, an MSPB Administrative Judge (AJ) dismissed Complainant's MSPB appeal for failure to prosecute.

The instant appeal followed.

CONTENTIONS ON APPEAL

Neither party submitted a statement or brief on 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. The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

MSPB Election

A mixed case complaint is a complaint of employment discrimination filed with a federal agency, related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1). An aggrieved person may initially file a mixed case complaint with an agency or may file a mixed case appeal directly with the MSPB, pursuant to 5 C.F.R. § 1201.151, but not both. 29 C.F.R. § 1614.302(b). 29 C.F.R. § 1614.107(a)(4) provides that an agency shall dismiss a complaint where the complainant has raised the matter in an appeal to the MSPB and 29 C.F.R. § 1614.302 indicates that a complainant has elected to pursue the non-EEO process.

Here, we find that Complainant elected to proceed before the MSPB, as the record shows that he filed an appeal with the MSPB on June 7, 2023, approximately six months before filing the instant formal EEO complaint on December 4, 2023. On June 7, 2023, the MSPB AJ issued an Acknowledgment Order, which ordered Complainant to file, within 15 calendar days of the date of the Order, evidence or argument to establish why his appeal should not be dismissed for lack of a nonfrivolous allegation of jurisdiction. Complainant did not respond. The MSPB AJ issued two orders to show cause ordering Complainant to address the issue of jurisdiction and warning that failure to comply could result in the sanction of dismissal of the appeal for failure to prosecute, and Complainant did not respond to the orders. On July 19, 2023, the MSPB AJ dismissed Complainant's appeal for failure to prosecute. We find that the Agency properly dismissed claim (1) pursuant to 29 C.F.R. § 1614.107(a)(4) on the grounds that Complainant appealed to the MSPB and elected to pursue the non-EEO process. See Balch v. Dep't of Agric., EEOC Appeal No. 01996771 (Sept. 13, 2000) (affirming agency dismissal pursuant

to 29 C.F.R. § 1614.107(a)(4) where complainant appealed termination to MSPB before filing EEO complaint and MSPB dismissed appeal for failure to prosecute).

Untimely EEO Counselor Contact

EEOC regulation 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of 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). EEOC regulation 29 C.F.R. § 1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO 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. EEOC regulation 29 C.F.R. § 1614.105(a)(2) allows the Agency or the Commission to extend the time limit if the complainant can establish that Complainant was not aware of the time limit, that Complainant did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence Complainant was prevented by circumstances beyond his control from contacting the EEO counselor within the time limit, or for other reasons considered sufficient by the Agency or Commission.

Here, the alleged discriminatory events occurred between March 29, 2023, and May 8, 2023, but Complainant did not initiate contact with an EEO counselor until November 20, 2023, which was well beyond the 45-day limitation period. As the Agency noted in its decision, paragraph (8) of the Notice of Termination informed Complainant of the time limit for contacting an EEO counselor and provided Complainant with contact information for the EEO Office. Complainant has not presented any arguments or evidence warranting an extension of the time limit for initiating EEO counselor contact. Moreover, an appeal to the MSPB does not toll the time limit for EEO contact. See Helen G. v. Dep't of the Army, EEOC Appeal No. 0120180149 (Feb. 2, 2018). We find that the Agency properly dismissed Complainant's remaining claims pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact.

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision dismissing Complainant's EEO complaint.

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).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 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. 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

December 9, 2024

Date