



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

[REDACTED]
Tyree B.,¹
Complainant,

v.

Mark Averill,
Acting Secretary,
Department of the Army,
Agency.

Appeal No. 2024003241

Hearing No. 570-2023-00378X

Agency No. ARCEME22JAN01748

DECISION

Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403, from the Agency's April 24, 2024, final order concerning an equal employment opportunity (EEO) complaint alleging 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.

At the time of events giving rise to this complaint, Complainant worked as a GS-0303-8, Staff Assistant at U.S. Army Corps of Engineers, Transatlantic Middle East District (MED), Engineering Division in Winchester, Virginia.

On June 9, 2022, Complainant filed an EEO complaint alleging discrimination by the Agency based on sex (male) and in reprisal for prior EEO activity when:

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.

1. In July 2021, supervisors in Engineering falsified a TAM Form 19 (Change Request) to promote two females and did so via name select, while they would not upgrade Complainant's position from a GS-8 to GS-9.
2. On February 9, 2022, his classification was held up due to his participation in the EEO process and his previous challenge of vaccine mandates.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant requested a hearing. On September 28, 2023, the AJ advised Complainant that claim 1 appeared to be untimely raised and issued a case management order instructing Complainant to file a motion demonstrating that claim 1 was timely filed.

On October 6, 2023, Complainant filed a motion stating that he initially contacted Director of Programs, his third level supervisor, on August 3, 2021, and again on November 3, 2021, concerning the July 2021 TAM Form 19 (Change Request) requesting his position be upgraded (reclassified). Complainant indicated that when he did not receive any response from the Director, he contacted an EEO Manager on December 7, 2021. In his December 7, 2021 email to the EEO Manager, Complainant raised his concerns about vaccine mandates and an "unresolved grievance" involving the TAM Form 19. Complainant asserted that "[t]he issue of discrimination wasn't apparent" until after exhausting all Agency internal redress up until December 15, 2021, i.e., when his then second level supervisor, a Chief of Engineering Division, denied his reclassification request. Complainant stated that he then made "official contact" with an EEO Counselor on January 4, 2022, within 45-day time limit.

The record shows that on July 14, 2021, Complainant sent an email to the Acting Chief stating that he submitted TAM Form 19, in which he requested reclassification of his position because he supported five of the seven branches and 70 or more employees. In response, on July 14, 2021, by email, the Acting Chief, denied Complainant's request.

Complainant also sent emails to the Director of Programs requesting his position upgrade on July 14, 2021, and again on July 26, 2021. The Director did not grant Complainant's request.

The Director indicated in an email, dated November 6, 2021, to Complainant that he previously communicated to Complainant about his position upgrade issue three months ago. The Director stated that in order to increase a position grade level, there must be increased responsibilities, complex tasks, and increased independent decision making. The Director further stated that a grade level increase could not be justified just based on increased workload, as Complainant asserted.

On October 13, 2023, the Agency filed its response to Complainant's motion indicating that Complainant's EEO Counselor contact was untimely. On October 17, 2023, the AJ found that claim 1 is properly dismissed for untimely EEO Counselor contact. The AJ stated that Complainant failed to provide any argument demonstrating that the equitable principle of estoppel applied to this case.

On March 26, 2024, the Agency submitted a motion for a decision without a hearing regarding claim 2. Complainant filed his opposition.

On April 16, 2024, the AJ issued a decision without a hearing regarding claim 2. The AJ stated that the Agency articulated a legitimate, nondiscriminatory reason for denying Complainant's request for reclassification of his position. Specifically, the Agency denied Complainant's reclassification request in July 2021, and again in November 2021, because his increased workload as he claimed was not an appropriate metric for reclassification. The AJ stated that a female employee, identified by Complainant, was not similarly situated to Complainant because she, an Office Support Assistant, was in a lower grade and was changed from her GS-6 to GS-7 grade level. The AJ found that Complainant failed to demonstrate a nexus between his EEO activity and the Agency's action since the alleged incidents of July and/or November 2021, occurred prior to his December 2021 or January 2022 EEO contact. Complainant acknowledges that he had no prior EEO activity other than the instant case.

The Agency issued its final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed. On appeal, Complainant contends that he continued to address, without success, reclassification of his position with his supervisors through February 2022.

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. §1614.109(g).

An issue of fact is “genuine” if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is “material” if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ’s legal and factual conclusions, and the Agency’s final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a “decision on an appeal from an Agency’s final action shall be based on a *de novo* review...”); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VI.B. (Aug. 5, 2015) (providing that an administrative judge’s determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant’s favor.

Claim 1

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides, in relevant part, that the Agency shall dismiss a complaint that fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.105. EEOC Regulation 29 C.F.R. §1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within 45 days of the alleged discriminatory event, or the effective date of an alleged discriminatory personnel action.

In this case, Complainant alleged that he received the TAM Form 19, via email, dated July 13, 2021, upgrading the Office Support Assistant position from GS-6 to GS-7. The record indicates that Complainant contacted the Acting Chief of Engineer Division and the Director of Programs on July 14, 2021, raising his concerns regarding the TAM Form 19 and requesting reclassification of his position from GS-8 to GS-9. Complainant’s request was denied.

The Commission has adopted a “reasonable suspicion” standard (as opposed to a “supportive fact” standard) to determine when the limitation period is triggered under the EEOC Regulations. See 29 C.F.R. § 1614.105(a)(2); Hilda A. v. Dep’t of Veterans Affairs, EEOC Appeal No. 2020000832 (Jan. 31, 2020); Ball v. U. S. Postal Serv., EEOC Request No. 05880247 (July 6, 1988). Thus, the limitations period is not triggered until a complainant reasonably should have suspected discrimination, but before all the facts that would support a charge of discrimination have become apparent.

Upon review, we find that Complainant knew or reasonably should have suspected discrimination on July 14, 2021, i.e., when he contested the TAM Form 19 at issue, but he did not contact an EEO Counselor until January 4, 2022, which was beyond the 45-day time limit set by the regulations. We note that Complainant’s contact with the EEO Manager on December 7, 2021, would still be untimely. We note that Complainant’s contacts with his supervisors trying to informally redress the subject matter do not toll the time limit. On appeal, Complainant fails to present adequate justification to warrant an extension of the applicable time limit for contacting an EEO Counselor. Thus, we find that the Agency properly dismissed claim 1 due to untimely EEO Counselor contact. 29 C.F.R. § 1614.107(a)(2).

Claim 2

Upon review, we find that the Agency articulated a legitimate, nondiscriminatory reason for its denial of Complainant’s request for reclassification of his position from GS-8 to GS-9. The Agency stated that Complainant’s position reclassification/upgrade was denied because there was no justification to do so. Specifically, the Agency indicated that Complainant’s increased volume of work or duties he performed did not satisfy an appropriate factor for reclassification. We find that Complainant fails to provide any evidence the Agency’s articulated reason was pretextual. Upon careful review of the AJ’s decision and the evidence of record, as well as the parties’ arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

Accordingly, we AFFIRM the Agency’s final order implementing the AJ’s decision.

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

February 13, 2025
Date