



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Casandra N.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024003722

Agency No. 200I-20F2-2024-156990

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 1, 2024, dismissing her complaint of unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reasons presented below, we REVERSE the Agency's final decision dismissing Complainant's complaint and REMAND this matter to the Agency for further processing in accordance with the Order below.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint for untimely filing 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 was an applicant for employment with the Agency.

On March 28, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of age (63) when on February 7, 2024, she was not selected for the position of: Veterans Service Representative, Vacancy Announcement No. DHA-11950504-23-CB, GS-0996-07 in Atlanta, Georgia.

The Agency dismissed this claim pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely filing of the formal complaint. The Agency found Complainant had not filed her formal complaint within 15 days of receiving her Notice of Right to File and she had not shown that she was incapacitated.

CONTENTIONS ON APPEAL

On appeal², Complainant states she advised the EEO counselor that she was considering not filing a formal age discrimination complaint because she was tired of fighting and the EEO counselor told her that some things are worth fighting for. Complainant asserts that she asked the EEO counselor if her case would be reconsidered on appeal if she missed the "Appeal deadline" and the EEO counselor advised that Complainant would have to provide documentation as to why she did not timely file.

She also included the "Untimely Filing Letter" from her formal complaint in which she asked the Agency to accept her explanation for filing her complaint untimely because she suffered a foot injury on February 4, 2024 and had been under a doctor's care. She stated she had received treatment which included frequent doctor's visits, therapy, and pain medication that caused drowsiness and other side effects. She stated that the day she filed her formal complaint (March 28, 2024) was the only time she had been able to complete her formal complaint. The remainder of her statement addressed the merits of her complaint.

² On June 29, 2024, Complainant sought a 30-day extension to file a statement in support of her appeal "due to medical issues." Complainant was granted a 10-day extension until July 15, 2024. Complainant's statement was filed on July 1, 2024 is therefore timely.

The Agency contends on appeal that the final agency decision adequately set forth the legal authority and sound analysis to warrant dismissal of the instant Complaint on timeliness grounds, and Complainant had not advanced any new or material argument to warrant reversal of the Agency's dismissal.

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. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) provides, in relevant part, that an agency shall dismiss a complaint that fails to comply with the applicable time limits, unless the agency extends the time limits in accordance with 29 C.F.R. § 1614.604(c), which states these time limits are subject to waiver, estoppel and equitable tolling. A formal "complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f)." (29 C.F.R. § 1614.106(b)).

Here, the Agency asserts that Complainant received her Notice of Right to File on March 6, 2024, but she did not file her formal complaint until more than 15 days later, on March 28, 2024. At the time she filed her formal complaint, Complainant acknowledged her filing was not timely. (Complaint File, p. 16). Both at the time of her filing and on appeal, Complainant alleges incapacity due to a foot injury that occurred in February 2024 which required frequent medical visits and pain medication that left her drowsy and caused other side effects. The Agency noted in its dismissal that Complainant was able to contact Agency officials when necessary during the relevant time period.

The Commission has consistently held, in cases involving physical or mental health difficulties, that an extension is warranted only where an individual is so incapacitated by his condition that he is unable to meet the regulatory time limits. See Davis v. U.S. Postal Serv., EEOC Request No. 05980475 (August 6, 1998). Claims of incapacity must be supported by medical evidence of incapacity. See Crear v. U.S. Postal Serv., EEOC Request No. 05920700 (Oct. 29, 1992) (complaints of decreased mental and physical capacity, without medical evidence of incapacity, does not warrant extension of time limits); cf. Maddux v. U.S. Postal Serv., EEOC Request No. 05980302 (Aug. 5, 1999) (psychiatrist's statement that complainant's mental condition rendered her unable to comprehend her legal rights and responsibilities during the relevant time frame was found sufficient to justify extension of time limit); Sohal v. U.S. Postal Serv., EEOC Request No. 05970461 (Apr. 24, 1997) (psychiatrist's statement that complainant's severe depression and anxiety rendered him unable to make decisions found sufficient to justify extension). Evidence that a complainant has sought treatment does not, without evidence of incapacity, justify an extension of time. See Galbreath v. Dep't of the Navy, EEOC Request No. 05980927 (Nov. 4, 1999) (evidence that complainant was under great mental stress, and received an evaluation/treatment, did not render the complainant incapacitated). See also Dos Santos v. Dep't of Veteran's Affairs, EEOC Request No. 01992476 (Jan. 3, 2001); Lindsey T. v EEOC, EEOC Request No. 0120162544 (Nov. 27, 2019); King v. Dep't of Veteran's Affairs, EEOC Request No. 01A04960 (Dec. 22, 2000).

Here, the record reflects that Complainant provided her Family and Medical Leave Act documentation from her physician showing that her physician stated Complainant would be incapacitated for a continuous period of time beginning March 4, 2024 and ending May 6, 2024. (Complaint File, p. 186-189). We find that this is sufficient to show that Complainant was incapacitated during the period in which she received her Notice of Right to File and filed her formal complaint. Therefore, we find an extension is warranted and Agency should not have dismissed the complaint.

CONCLUSION

Based on the foregoing, 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 (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).

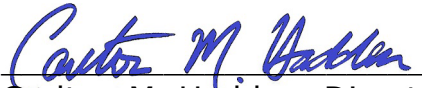
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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

November 12, 2024
Date