



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

[REDACTED]  
Fred S,<sup>1</sup>  
Complainant,

v.

Kristi L. Noem,  
Secretary,  
Department of Homeland Security  
(Transportation Security Administration),  
Agency.

Appeal No. 2024003757

Agency No. HS-TSA-00516-2024

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated May 2, 2024, dismissing the formal 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reasons discussed below, we affirm the Agency dismissal of Complainant's claims.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's complaint for untimely EEO Counselor contact.

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<sup>1</sup> 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 Senior Federal Air Marshal, Series I-10, at the Agency's Federal Air Marshal Service, Philadelphia Field Office, facility in Philadelphia, Pennsylvania.

On December 21, 2023, Complainant initiated contact with an Equal Employment Opportunity (EEO) Counselor.

On February 9, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to harassment on the bases of sex (male), disability (not specified), age (49), and reprisal when:

1. On July 23, 2023, a co-worker took a photograph of Complainant and circulated the photograph among his peers; and,
2. On August 2, 2023, management issued Complainant a no-contact order and placed him on restricted duty.

On May 2, 2024, the Agency issued a final decision dismissing the formal complaint pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact. The Agency found Complainant contacted an EEO Counselor well beyond the 45-day time limitation and failed to provide justification for the delay to warrant tolling the time frame.

Complainant, through his attorney, filed the instant appeal.

### CONTENTIONS ON APPEAL

On appeal, Complainant's counsel argues Complainant was not aware of the circulation of the photograph at issue until November 6, 2023. Complainant admits he was aware of the charges and investigation grounds upon his placement on restricted duty and no contact on August 1, 2023. However, Complainant was under the belief that the Agency would complete its investigation with a favorable finding that he had not engaged in any misconduct.

In response, the Agency argues that Complainant concedes he was aware of the time limitation, and clear that Complainant suspected or reasonably should have suspected discrimination occurred within this time period. The Agency requests the Commission affirm the 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

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that the Agency shall dismiss a complaint for failure to comply with the applicable time limits. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of an EEO counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. The Commission has long adopted a "reasonable suspicion" standard to determine when the forty-five (45) day limitation period is triggered. See Howard v. Department of the Navy, EEOC Request No. 05970852 (February 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

Unless stated otherwise, EEOC's time limits are in calendar days. 29 C.F.R. § 1614.604(a). To be deemed timely filed, a document must be received or postmarked before the time limit expires. 29 C.F.R. § 1614.604(b). Time limits are subject to waiver, estoppel or equitable tolling. 29 C.F.R. § 1614.604(c). Time limits start the first day after notice and include weekends or holidays; if the last day falls on a weekend or holiday, then the time limit extends to the next business day. 29 C.F.R. § 1614.604(d).

Here, in addressing claim 2, we examine the most recent discriminatory event to determine timeliness. Complainant discovered on August 2, 2023 that management had issued a no-contact order and placed Complainant on restricted duty.

The timeframe for Complainant to would have been from the first calendar day counted (Wednesday, August 2, 2023) through the last calendar day counted or the forty-fifth calendar day, September 16, 2023, which was a Saturday. Because the last calendar day was a Saturday, Complainant therefore had until the next business day, Monday September 18, 2023. Complainant did not initiate EEO contact until December 21, 2023, which is well beyond the forty-five (45) day limitation period. On appeal, Complainant has presented no persuasive arguments or evidence warranting an extension of the time limit for initiating EEO Counselor contact.

Regarding claim 1, the Agency noted Complainant's attorney stated Complainant was not aware of the distribution of the photograph until November 2023. The Agency noted Complainant should have reasonably suspected discrimination when he was issued the no contact order on August 2, 2023 and placed on restricted duty, because the no contact order indicated that allegations were being made against Complainant and that he should stop all contact with a co-worker, even though Complainant believed that he had not engaged in any inappropriate behavior. We find the issuance of the no contact order and placement on restricted duty on August 2, 2023, provided Complainant with reasonable suspicion of any discrimination, triggering the start of the 45-day time limitation, which Complainant failed to adhere to.

To the extent Complainant's attorney argued on appeal Complainant initiated EEO contact on November 21, 2023, we also find this contact was untimely. As evidence of timeliness, Complainant attached to his appellate brief an email on November 21, 2023, Complainant sent to the Agency anti-harassment coordinator inquiring about an allegation of harassment. Assuming this email constituted contact with a person reasonably connected to the EEO process, Complainant still did not initiate contact until more than 45-days after August 2, 2023, when he had a reasonable suspicion of discrimination.

Complainant does not dispute he was aware of the 45-day regulatory time frame. The Agency noted Complainant completed multiple training sessions, including DHS No Fear Act training, from 2009, to 2019, so Complainant was aware of the 45-day time period to contact an EEO Counselor. Additionally, the Agency provided photos showing the EEO guidance on filing a claim, including time frames for contacting an EEO Counselor, was posted in Complainant's common areas of his workplace.

Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact.

### CONCLUSION

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

### 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 3, 2025

Date