



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

[REDACTED]
Jefferey G.,¹
Complainant,

v.

William J. Burns,
Director,
Central Intelligence Agency,
Agency.

Appeal No. 2024003790

Agency No. 24-46

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated May 8, 2024, dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the reasons set forth herein, we REVERSE the Agency's final decision.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint on the grounds that it failed to state a claim and that he contacted an EEO counselor in an untimely manner.

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

According to Complainant, in April 2023, the contract that he had been working under with the Agency, since 2019, was recompeted. Although the same contracting company was awarded the contract, for the first time, all employees were required to undergo a lengthy medical evaluation. Complainant maintained that various questions were not and could not have been related to his abilities to perform his job-related functions under the contract. Complainant stated that he was threatened with termination if he failed to complete the medical clearance questionnaire. Ultimately, he elected to resign on July 21, 2023.

On April 5, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to harassment based on disability when, from April 2023 through July 21, 2023, the following occurred:

1. In April 2023, he was required to submit private, non-job-related medical information in violation of the Rehabilitation Act to the Agency as part of the security clearance process; and
2. On 21 July 2023, he was constructively removed from his contract position.

In its final decision, the Agency dismissed Complainant's formal complaint on three grounds, i.e., (1) failure to state a claim in that the matter involved a security clearance determination; (2) untimely filing of the formal complaint in that it was filed 16 days after Complainant received notice of his right to file; and (3) untimely EEO counselor contact in that Complainant resigned his position on July 21, 2023, but did not contact an EEO counselor until December 19, 2023.

With regard to claim 1, the Agency maintained that "[a] medical screening process and questionnaire are part of the Agency's determination as to an individual's suitability for employment and eligibility for access to classified information." The Agency argued that Complainant's decision to resign from his position, rather than undergo medical screening by completing the medical questionnaire, which was a required step in the security clearance approval procedure, was a challenge to the validity of the security clearance process and was therefore beyond the Commission's jurisdiction to review.

With respect to the timeliness of Complainant's formal complaint filing, the Agency noted that Complainant wrote on the complaint form that he received the notice of his right to file (NRTF) on March 20, 2024, which

means that it was due on April 5, 2024, 15 days later. The complaint was actually filed on April 6, 2024. The Agency did acknowledge that on March 22, 2024, Complainant sent an email acknowledging that he had received the NRTF. The EEO Counselor, apparently presuming that March 22, 2024 was the date of receipt, informed Complainant that his complaint was due on April 6, 2024.

With respect to Complainant's EEO Counselor contact, the Agency noted that although he resigned from his position on July 21, 2023, he did not contact an EEO counselor until December 19, 2023, or 151 days later. The Agency noted that he had been employed with the Agency since October 2020. The Agency noted that, from October 2020 until July 2023, Complainant worked as a Contractor in Agency facilities that, prominently, displayed notices containing information on the 45-day timeframe for contacting an EEO counselor.

Finally, the Agency indicated that Complainant's complaint may also be subject to dismissal based on his contract status. The Agency, however, did not reach a conclusion on this issue.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the dismissal of his complaint was improper because: (1) the Commission has the authority to review the issues raised despite the Agency's contention that it involves a security clearance determination; (2) his formal complaint was timely filed; (3) he was not aware of the 45-day deadline to contact an EEO counselor; and (4) although a Contractor, he has standing to bring the complaint because the Agency, based on Commission precedent, should be deemed his employer for purposes of filing an EEO complaint. Complainant asks that the Commission reverse the Agency's final decision and remand this matter for further investigation.

Specifically, Complainant argued that despite the Agency's attempt to "[l]ump the medical questionnaire under the purview of a security clearance review, it really was nothing more than a non-job-related medical clearance questionnaire." According to Complainant, this had nothing to do with a security clearance decision, because at no point has Complainant's security clearance ever been at issue.

The Agency, he notes, admits that the “medical screening process and questionnaire are part of the Agency’s determination as to an individual’s suitability for employment.” Complainant further argues that the “non-job-related” medical examination and inquiry were in violation of the Rehabilitation Act. Therefore, he maintains that he is not challenging the substance, but rather the manner in which the Agency is attempting to collect non-job-related information with no business necessity for doing so.

With respect to the timeliness of his EEO Counselor contact, Complainant argued that, upon learning about the medical inquiry, he contacted various individuals and entities he believed could address his concerns, including, among others, management, the Inspector General, the General Counsel, and the Director, and, in October 2023, his congressional representative. He stated that he did not learn of his ability to file an EEO complaint until he sought outside counsel in December 2023, after all other avenues failed. Upon contacting outside counsel because he felt his only remaining option was to file a lawsuit, he was informed of his ability to file a complaint through the EEO process.

Complainant also maintained that the EEO Counselor, by her March 22, 2024 email, extended the time frame for filing his complaint to April 6, 2024 and therefore, his April 5, 2024 submission was timely. Finally, he argued that the Agency had sufficient control over his work and performance such that it should be deemed his common law employer.

In its response to Complainant’s appeal, the Agency only focused on two of its grounds for dismissal, i.e., Complainant’s allegations are outside of the Commission’s purview because they involved a security clearance determination, and the timeliness of his EEO counselor contact. The Agency stated that, if there were any further proceedings in this matter, it would then develop the necessary record regarding whether Complainant timely filed his EEO complaint, and whether he was a joint employee with the Agency.

According to the Agency, “[t]he central flaw in Complainant’s argument” is that he ignores the fact that the questionnaire he refused to complete was part of what it considers when deciding whether to give a person a security clearance and allow them access to classified information. Moreover, the Agency argued that Complainant may not claim that he lacked knowledge of the 45-day time limitation period for contacting an EEO counselor because, during the almost three-year period before his claim arose, he worked in

facilities containing posters informing individuals of the procedures if they believe they have been subjected to discrimination.

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

We note that the Commission has the discretion to review only those issues specifically raised in an appeal. See EEOC Management Directive for 29 C.F.R. Part 1614, (MD-110), Chap. 9, § IV.A. (Aug. 5, 2015) ("Although the Commission has the right to review all of the issues in a complaint on appeal, it also has the discretion to focus only on those issues specifically raised on appeal."). Because the Agency, for purposes of this appeal, has essentially withdrawn its assertions that Complainant filed his complaint in an untimely manner, and did not have standing to file a complaint because he was a Contractor - these issues will not be addressed in this decision.

Failure to State a Claim

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disability. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

With regard to the Agency's contention that the Commission lacks jurisdiction over this complaint, we note that the Commission has long held that it will not review an agency's determination regarding the substance of a security clearance decision. See Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended, EEOC Notice No. N-915-041 (May 1, 1989); Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

We find, however, that the Agency's arguments are misplaced in this case because the adjudication of this complaint requires no review of the *substance* of a "security clearance determination." As the Agency clearly states in its brief final decision, "[a] medical screening process and questionnaire are part of the Agency's determination as to an individual's suitability for employment and eligibility for access to classified information." As Complainant correctly argues although the medical screening process and the questionnaire are part of the Agency's determination as to an individual's suitability for employment, the substance of a security clearance determination need not be addressed if this matter were remanded for a hearing.

While the Commission will not review the substance of security clearance decisions, the Commission is not precluded from determining whether the grant, denial or revocation of a security clearance was conducted in a discriminatory manner. Thierjung v. Defense Mapping Agency, EEOC Request No. 05880664 (Nov. 2, 1989). Assuming, arguendo, that the Agency's contention that matters involving the medical screening process and the ultimate decision to grant a security clearance are intertwined is correct, Complainant argues that the Agency conducted the security clearance process in a discriminatory manner with respect to his situation. Specifically, he alleges that the Agency sought non-job-related medical information in violation of the Rehabilitation Act. Therefore, we find that he is not challenging the substance of a security clearance determination, but rather the manner in which the Agency conducted the determination, a matter within the Commission's jurisdiction.

Untimely EEO Counselor Contact

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 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 adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 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.

EEOC regulations provide that the agency or the Commission shall extend the time limits when the individual shows that he or she was not notified of the time limits and was 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. See 29 C.F.R. § 1614.604(c).

Here, Complainant argues that his failure to meet the 45-day time deadline was due to his lack of knowledge about the time limit. He further maintained that the mere alleged presence of posters does not establish whether such posters regarding the 45-day deadline were present in the Agency facilities where he worked or whether he (or other Contractors) frequently entered the rooms in which any such posters were present (if at all). Moreover, he argues that because he was a Contractor, it would not have been apparent to him whether any such notices within Agency facilities (aimed at employees, and not Contractors) were applicable to him.

The Commission has long held that we will impute constructive knowledge to an employee where an employer has fulfilled its statutory obligation by posting notices informing employees of their rights and obligations under Title VII. See Kevin B. v. U.S. Postal Serv., EEOC Appeal No. 2024001063 (Apr. 8, 2024). The Agency must submit specific evidence that the poster contained notice of the applicable time limits. Pride v. U.S. Postal Serv., EEOC Appeal No. 05930134 (Aug. 19, 1993). Thus, we would not find relevant Complainant's assertions regarding the frequency he and other Contractors might have entered various rooms or whether they actually read or understood the posters.

In the instant matter, the record contains a copy of the type of poster the Agency, in its brief, claims was on display in the facilities where Complainant worked. This poster indicates the applicable time limitation period for contacting an EEO counselor, and how to initiate EEO contact. See Complaint File at p. 74.

We note, however, that the record does not contain an affidavit from a person with knowledge attesting to the fact that this poster or one like it was on display in conspicuous places at Complainant's work facility, and when.

The Commission has long held that where, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Guy v. Department of Energy, EEOC Request No. 05930703 (Jan. 4, 1994) (quoting Williams v. Dep't of Defense, EEOC Request No. 05920506 (Aug. 25, 1992)). In addition, in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decisions." See also Gens v. Dep't of Defense, EEOC Request No. 05910837 (Jan. 31, 1992). Because we find that the Agency has not persuasively established that Complainant had constructive knowledge of his obligation to contact an EEO Counselor within 45-days of his June 21, 2023, resignation, we find the dismissal for untimely EEO counselor contact was improper. We find that Complainant has provided sufficient justification for extending or tolling the time limit.

CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint, and REMAND this matter 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

December 11, 2024

Date