



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

[REDACTED]
Neville B.,¹
Complainant,

v.

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

Appeal No. 2024003791

Agency No. 200P-640-2024-157313

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 29, 2024, dismissing her 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reasons presented below, we AFFIRM the Agency's final decision dismissing Complainant's complaint.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's formal complaint pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact.

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 Nurse Practitioner, VN-3, at the Agency's Palo Alto VA Health Care System facility in Palo Alto, California.

On May 3, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Not Specified) and age (Not Specified) when, on July 28, 2023, Complainant became aware that she was the only employee in the department who did not receive a performance award for Fiscal Year 2022 despite a "highly satisfactory" performance rating.

The Agency dismissed this claim pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact, finding that although Complainant developed a reasonable suspicion of discrimination on July 28, 2023, she did not contact an EEO counselor until months later, on February 27, 2024. Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant contends her EEO counselor contact was timely because she did not initially have any reason to suspect discrimination until she learned that she was the only one not given an award. Complainant states she wanted to give the Agency the benefit of the doubt since she had received an award for Fiscal Year 2021 after bringing the issue to the attention of the Agency. She stated she did not realize the failure to award the Fiscal Year 2022 award was intentional until after her contact stopped responding in January 2024 and speaking with other nurses. Complainant asserts she did not believe or realize she was being discriminated against until late February of 2024 and that she had to be certain beyond a doubt before she accused someone.

The Agency contends on appeal that Complainant stated in the formal complaint that she became aware on July 28, 2023 that she was the only employee in her department who did not receive a performance award for Fiscal Year 2022 and therefore she should have reasonably developed suspicion of discrimination on that date. The Agency further notes that Complainant sent an email on September 12, 2023 in which she brought up filing an EEO complaint and noted that EEO complaints have time limits. The Agency argues that Complainant had therefore developed a reasonable suspicion of discrimination by September 2023.

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. §1614.105(a)(1) provides that an aggrieved person must initiate contact with 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. EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides for the dismissal of complaints where the complainant did not initiate contact with 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 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 45-day limitation period is triggered. See Junior T. v. U.S. Postal Serv., EEOC Appeal No. 2023002297 (Apr. 27, 2023) (citing 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.

Here, Complainant alleged both during EEO counseling and in her formal complaint that she learned around July 28, 2023 that other coworkers had already received their performance awards. Thus, she should have developed a reasonable suspicion of discrimination at that time. In order to make sure EEO counselor contact timely, she needed to initiate contact within 45 days, or on or before September 11, 2023. She did not contact an EEO counselor until February 27, 2024, over five months later.

We are not persuaded by Complainant's arguments that she needed to be certain beyond doubt because such information would be in the nature of supportive facts as opposed to a reasonable suspicion.

As noted by the Agency in its appeal brief, on September 12, 2023, Complainant herself mentioned the possibility of filing an EEO complaint and that such filing had a time limit. Therefore, she clearly suspected discrimination at that point, but still did not contact an EEO counselor for another five months.

Therefore we find the Agency properly dismissed the complaint for untimely EEO counselor contact.

CONCLUSION

For the foregoing reasons, we AFFIRM the Agency's dismissal of the formal 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

November 25, 2024

Date