



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

[REDACTED]
Assunta V,¹
Complainant,

v.

Martin J. O'Malley,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2024003804

Agency No. DAL-24-0317-SSA

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated May 13, 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 set forth herein, we REVERSE the Agency's final decision dismissing Complainant's complaint and we REMAND this matter to the Agency for further processing.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's complaint 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

During the period at issue, Complainant worked for the Agency as a Legal Assistant in New Orleans, Louisiana.

On January 29, 2024, Complainant initiated EEO Counselor contact. Informal efforts to resolve her concerns were unsuccessful. On May 1, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on race (Hispanic), national origin (Hispanic), color (tan), age, and reprisal for prior protected EEO activity.

In its May 13, 2024 final decision, the Agency determined that the formal complaint was comprised of the following claims:

1. Whether [the Agency] subjected Complainant to disparate treatment...when on September 11, 2023, management revoked Complainant's telework privileges.
2. Whether the Agency subjected Complainant to disparate treatment when, on December 11, 2023, Complainant was left to manage the office alone.
3. Whether the Agency subjected Complainant to nonsexual harassment ...beginning September 11, 2023, and continuing, in terms of excluding Complainant from lunch, leaving Complainant alone to manage the office, and revoking Complainant's telework privileges.

The Agency dismissed Complainant's complaint for untimely EEO Counselor contact. The Agency reasoned that Complainant did not initiate EEO contact until January 29, 2024, outside of the applicable time period for the alleged discriminatory incidents.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant requests that we reverse the Agency's final decision dismissing her complaint. Regarding claim (2), Complainant asserts that she did not reasonably suspect discrimination until December 22, 2023, when she had a conversation with a co-worker.

In response, the Agency requests that we affirm its final decision dismissing Complainant's complaint. The Agency reiterates that Complainant's complaint should be dismissed for untimely EEO Counselor contact. Regarding claim (2), the Agency sets forth that while Complainant argues that the time for her to initiate contact with an EEO Counselor did not start until she reasonably suspected discrimination on December 22, 2023, based on a conversation with a co-worker, Complainant does not indicate what additional information she learned that caused her to reasonably suspect discrimination. The Agency asserts Complainant was already aware on December 11, 2023, that the other employees were in the office, and that she was left alone without any officer-in-charge. Agency Brief at 6.

In reply, Complainant asserts that she is not contesting the Agency's dismissal of claims (1) and (3).² Complainant's Reply at 2. Regarding claim (2), Complainant asserts that, after a conversation with a co-worker on December 22, 2023, she reasonably suspected discrimination. Complainant asserts that at this time she realized that a group of individuals had gone to lunch. Complainant's Reply at 1.

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) 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.

² Because Complainant is not contesting the dismissal of claims (1) and (3), we decline to address these claims further herein.

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 was not notified of the time limits and was not otherwise aware of them, that he did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he was prevented by circumstances beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

The Agency improperly dismissed claim (2) for untimely EEO Counselor contact. According to the EEO Counselor's Report, Complainant is alleging that on December 11, 2023, a named supervisor took three of Complainant's younger African American co-workers out to lunch and required Complainant to manage the office alone. Complainant File at 34-35. We find, however, that Complainant did not reasonably suspect discrimination until December 21 or December 22, 2023. According to the EEO Counselor's Report, while Complainant asserts that she saw a named supervisor and three of her co-workers in the office on December 11, 2023, she further asserts that on December 21, 2023, the security guard who is assigned to monitor the lobby of the office informed her that the named supervisor had taken Complainant's three co-workers to lunch on December 11, 2023.³ Complaint File at 34. According to the Counselor's Report, Complainant asserts that the office typically assigns a management official as "officer-in-charge" to remain in the office during business hours but on the day in question she was the only employee that remained on the office. Id. Based on the foregoing, and Complainant's statements on appeal, we find that Complainant reasonably suspected discrimination regarding the matter set forth in claim (2), on December 21 or 22, 2023, after her conversation with the security guard, when she realized that a named supervisor took her three younger African American co-workers out to lunch and she was the only employee left to manage the office.

³ On appeal, Complainant asserts that the conversation with the security guard occurred on December 22, 2023 (rather than December 21, 2023, as set forth in the EEO Counselor's Report).

Regardless of if we use December 21, 2023, or December 22, 2023, as the date Complainant reasonably suspected discrimination, Complainant's EEO contact on January 29, 2024 is timely.

CONCLUSION

We REVERSE the Agency's final decision dismissing claim (2) and we REMAND this matter for further processing in accordance with the ORDER below.

ORDER (E0224)

The Agency is ordered to process the remanded claim (claim (2)) in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claim **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)

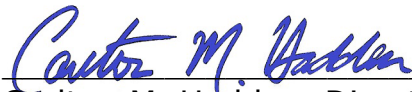
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 18, 2024

Date