



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

[REDACTED]
Valda R,¹
Complainant,

v.

Todd Hunter,
Acting Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2024004110

Agency No. 200H-528-2024-156477

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 28, 2024, dismissing a 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. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's formal discrimination complaint for failure to comply with the applicable time limit.

BACKGROUND

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.

During the period at issue, Complainant worked as an Operating Room Nurse Manager, Nurse Level 3, at the Agency's medical center in Buffalo, New York.

In June 2023, Complainant applied and interviewed for a Nurse Level 4 promotional vacancy as Program Manager for Cardiology Services. On July 19, 2023, Complainant emailed management inquiring about the status of her application. On July 20, 2023, the Agency notified Complainant that she was not selected for the position and that another candidate had been selected.

On November 18, 2023, Complainant initiated contact with an EEO Counselor. The parties did not resolve the matter informally.

On April 4, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on sex (female) and age (over 40) when:

On July 20, 2023, Complainant was not selected for the position of Program Manager for Cardiology Services under vacancy announcement PN-91604622.

On June 28, 2024, the Agency issued a final decision dismissing the formal complaint. The Agency determined that Complainant had failed to comply with the applicable forty-five-day time limit for EEO Counselor contact under 29 C.F.R. §§ 1614.105(a)(1) and 1614.107(a)(2).

CONTENTIONS ON APPEAL

On appeal, Complainant argued that her EEO Counselor contact was timely. Complainant emphasized that the most recent incident date for her non-selection claim was October 18, 2023, when she first found out that a candidate from outside of the Agency, who was male and appeared to be under 30, was selected.

In response, the Agency argues that Complainant had developed a reasonable suspicion about management improperly thwarting promotion opportunities as early as October 2021, and that she remained reasonably suspicious at the time she was notified that another candidate had been selected for the vacancy on July 20, 2023. The Agency noted that, previously, Complainant had filed an Office of Inspector (OIG) complaint about impropriety in the Agency's management of Nurse Level 4 positions at her facility. Then, in February 2023, the OIG had advised Complainant to engage the Agency's EEO process via the Office of Resolution Management, Diversity and Inclusion

to pursue such claims. The Agency chiefly cited our decision in Hall v. Dep't of Veterans Affairs, EEOC Appeal No. 0120113888 (Dec. 5, 2012) among others, for the proposition that Complainant should have developed a reasonable suspicion of discrimination immediately after her July 20, 2023, non-selection, even without knowing the identity of the selectee because, at that time, she already believed that management had exhibited its preference for other candidates for the Program Manager for Cardiology Services position.

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) provides, that complaints of discrimination must be brought to the attention of an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five days of the effective date of the action. Time limits shall be extended if a complainant was not notified of the time limits, was unaware of them, or reasonably did not know that the discrimination occurred, or that, despite due diligence, circumstances beyond a complainant's control prevented timely EEO Counselor contact, or for other reasons considered sufficient by the Agency or EEOC. 29 C.F.R. § 1614.105(a)(2).

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. 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.

It is undisputed that the allegedly discriminatory non-selection event occurred on July 20, 2023, but Complainant did not initiate contact with an EEO Counselor until November 18, 2023, which is beyond the forty-five-day limitation period. Based on a fair reading of her appellate brief, Complainant is contending that she did not reasonably suspect discrimination in her non-selection until October 18, 2023, when she learned that the selectee was a male, under 40 years of age, less qualified and from outside of the Agency.

We disagree with the Agency that Complainant's *general* concerns that management was blocking her from a Nurse Level 4 position should have motivated Complainant to contact an EEO Counselor upon the Agency's July 20, 2023 notice of non-selection. Rather, we find Complainant's learning of the identity and qualifications of the selectee triggered her reasonable suspicion of discrimination. After all, the Nurse Level 3 employee who was previously selected for the Nurse Level 4 position which Complainant desired had been from within the Agency and was female. In other words, it was reasonable that the prior selection of a co-worker who shared Complainant's EEO characteristics and had similar qualifications did not immediately inform her suspicions about the latter selectee before she determined that he lacked both Agency experience and had different protected statuses. Under these particular circumstances, we find that Complainant did not develop reasonable suspicion of discrimination until October 18, 2023, when she was informed who had been selected. See Deidre A. v. U.S. Postal Serv., EEOC Appeal No. 2022000901 (Feb 28, 2022) (complainant's learning of the identity of the selectees triggered her reasonable suspicion of discrimination) and Filosi v. U.S. Postal Serv., EEOC Appeal No. 0120100878 (June 24, 2011)(complainant did not acquire a reasonable suspicion of discrimination until she learned the identities of the selectees). Consequently, we find that Complainant initiated timely EEO Counselor contact, and that the Agency improperly dismissed her complaint.

CONCLUSION

The Agency's final decision dismissing the formal complaint is REVERSED and REMANDED for further processing as set forth in 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

January 29, 2025
Date