



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

[REDACTED]
Shan D.,¹
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services
(Centers for Disease Control and Prevention),
Agency.

Appeal No. 2024004147

Agency No. HHS-CDC-0320-2024

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 4, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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's final decision properly dismissed Complainant's formal complaint for untimely equal employment opportunity (EEO) contact pursuant to 29 C.F.R. § 1614.107(a)(2).

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 Health Scientist, GS-13, at the Agency's Global Health Center in Atlanta, Georgia. On March 22, 2024, Complainant initiated EEO contact alleging that the Agency discriminated against her based on race (African-American), sex (female), color (Black), and reprisal for prior protected EEO activity (April 2023 and February 2024 prior complaints) when, the Agency failed to select Complainant for a vacant Senior Advisor Health Scientist, GS-14, position.

Complainant stated, on February 8, 2024, during a meeting with the Principal Deputy Director she was told selections were already made for the positions and there was "nothing [Complainant] could have done to be selected." On March 20, 2024, the Agency announced the three selectees – two males and one female, all of whom are outside of Complainant's protected class of race. She added that one male did not have the subject matter experience she has and was less qualified than her.

The record contains two emails from the USA Staffing Office to Complainant's email address of record. The emails are dated November 29, 2023 and January 24, 2024; have the subject of "Outcome of your referral for Health Scientist; and state "We regret to inform you that you were not selected." Subsequently, in May 2024, Complainant filed a formal EEO complaint reiterating her allegation of discriminatory non-selections.

The Agency issued a final decision (FAD) dismissing Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact. The FAD stated that Complainant was informed of her non-selections, which are discrete acts, by the November 29, 2023 and January 24, 2024 emails from USA Staffing. It noted that she did not initiate EEO contact until March 22, 2024, which is beyond the 45-day statutory timeframe. The instant appeal from Complainant followed.

CONTENTIONS ON APPEAL

On appeal, Complainant stated that she "did not reasonably suspect discrimination when she initially learned of the Agency's adverse action because she did not know the identities of the selected candidates or have any other indication that she was subject to discrimination through this adverse action."

Complainant stated, she did not learn two of the three selectees were male, all three selectees were outside of her race class, and at least one of the selectees was less qualified than she until the Agency announcement on March 20, 2024. Complainant noted that she initiated EEO contact on a separate matter on April 26, 2023.

The Agency opposed Complainant's appeal, asking that the Commission affirm its dismissal for untimely EEO contact. The Agency stated that Complainant is familiar with the statutory timeframes as they are posted at the facility and provided in new employee orientation and other employee training, and she has prior EEO activity. It reiterated its prior contentions.

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 must 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 (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.

The record discloses that Complainant was notified of her non-selections via USA Staffing emails on November 29, 2023 and January 24, 2024, but did not contact an EEO Counselor until March 22, 2024, which is beyond the 45-day statutory limit. Complainant argues that she did not learn of the discrimination until March 20, 2024 when the Agency announced the three selectees, and two were outside of her protected class of sex, and all three were outside of her protected class of race. The Agency argues that Complainant should have developed reasonable suspicion of discrimination when she received the USA Staffing notice of her non-selections on November 29, 2023 and January 24, 2024. We note, however, that the Agency fails to justifiably explain why such a notice of non-selection should have reasonably aroused Complainant's suspicion of discrimination.

EEOC Regulations provide that the agency or the Commission shall extend the time limits when the individual shows that she was not notified of the time limits and was not otherwise aware of them, that she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence she was prevented by circumstances beyond her control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. 29 C.F.R. § 1614.105(a)(2). As such the regulations clearly allow for situations where a complainant only learns that a personnel action was discriminatory at some later date.

As stated above, where the complainant shows she learned of the discrimination after notification of the agency action, 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. In such cases, the Commission will look to what, if anything, complainant has learned between the date of the original incident and the event which first triggers the complainant's suspicion in making a determination as to whether the complainant meets the "reasonable suspicion standard." See e.g. Fowler v. U.S. Postal Service, EEOC Request No. 01952036 (January 16, 1996).

Here, Complainant maintains, on March 20, 2024, she learned that the three selectees were outside of her protected class(es), thus arousing reasonable suspicion of discrimination when she learned this information, but not before. We note in this regard that the Agency has not pointed to specific facts to support its contention that Complainant should have developed a "reasonable suspicion" of discrimination prior to the time she learned the selectees were of a different sex and race.

Complainant initiated EEO contact on March 22, 2024, which is within two days of when she states she developed reasonable suspicion of discrimination. We find Complainant's Counselor contact to have been timely as it is within the 45-day statutory limit.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the FAD and REMAND the claim for further processing in accordance with this decision and 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 30, 2024
Date