



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

████████████████████
Patricia H,¹
Complainant,

v.

Benjamin Huffman,
Acting Secretary,
Department of Homeland Security
(Headquarters),
Agency.

Appeal No. 2024004240

Agency No. HS-HQ-00196-2024

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 13, 2024, dismissing his 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. Upon review, the Commission finds that Complainant's complaint was properly 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 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

During the period at issue, Complainant worked as a Supervisory Program Analyst, Grade GS-15, in the Agency's Office of Strategy, Policy, in Washington, D.C.

In February 2023, Complainant contacted the Office of Inspector General's (OIG) whistleblower hotline. Complainant stated that when he inquired into filing an EEO complaint, OIG directed him to the Agency's Anti-Harassment Unit (AHU). Both the AHU and Office of Equal Employment Opportunity (EEO Office) are within the Office of Civil Rights and Civil Liberties (CRCL).

On March 1, 2023, Complainant emailed the Director of Operations for Policy who was his office's point of contact for EEO and other related matters; Complainant asked, "Can you please provide me with the information I need to initiate a harassment claim?" The Director of Operations for Policy promptly responded and provided the AHU's email address.

On March 8, 2023, the AHU emailed Complainant a letter (AHU notice) on CRCL letterhead. Therein, the AHU acknowledged that Complainant had contacted AHU to file a harassment report and stated AHU would the investigate the matter. The AHU notice also contained two paragraphs that elaborated on the EEO process.

In February 2024, the AHU and Complainant met via video conference. According to Complainant, it was at that point that AHU explained to him that AHU was not the proper office to file an EEO complaint. Complainant withdrew his AHU report and on March 19, 2024, Complainant initiated contact with an EEO Counselor. The parties efforts to resolve the matter were unsuccessful.

On May 23, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on age (50), sex (male, gay) and in reprisal for prior EEO-protected activity when:

1. From January 5, 2022, through his resignation on September 23, 2023, the Chief of Staff made derogatory comments to Complainant, including by questioning his suitability for his position and asking whether he had ever been called "queer" or "faggot" in the workplace;
2. On March 16, 2023, the Chief of Staff removed Complainant from his position and reassigned him to a subordinate position;

3. In May 2023, the Chief of Staff directed Complainant to clarify the duties of another employee even though he was not the employee's direct supervisor and suggested that Complainant's relationship with the employee was more than professional;
4. On June 21, 2023, the Chief of Staff provided Complainant a Letter of Expectations; and
5. On September 23, 2023, Complainant was constructively discharged.

On June 13, 2024, the Agency dismissed the complaint for untimely EEO Counselor contact. The Agency determined that the latest allegation of discrimination occurred when Complainant resigned on September 23, 2023, but Complainant did not contact an EEO Counselor until March 19, 2024 which was over four months beyond the applicable time limit of November 7, 2023. In its final decision, the Agency noted that in October 2020, Complainant had received anti-harassment training which informed him of the 45-day EEO time limit.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal and through Counsel, Complainant contends that his delayed EEO contact should be excused because he was misled by the OIG, and Director of Operations for Policy. Complainant asserts that, as a result, he had mistakenly believed that, by contacting the AHU, he had timely initiated the EEO process. Next, Complainant stated that his AHU contact served as timely EEO contact. In support of this position, Complainant cited numerous cases including Floyd v. Nat'l Guard Bureau, EEOC Request No. 05890086 (June 22, 1989) (a complainant satisfies the requirement of EEO Counselor contact by contacting an agency official "logically connected" with the EEO process, even if that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO process.) Complainant asserts the AHU was staffed by Agency officials who were logically connected to the EEO process, even though they were not EEO Counselors. Complainant states that the Agency's CRCL, where both the AHU and EEO Office were located, was an "administrative labyrinth" that foiled his intent to timely initiate the EEO process despite his good faith effort to so.

In response, the Agency argues that Complainant's appellate arguments ran contrary to Commission precedent.

Specifically, the Agency cited Emelda F., v. Dept. of Homeland Sec., EEOC Appeal No. 2024000892 (Apr. 25, 2024). The Agency states that this prior decision was almost factually identical. The Agency maintains that these cases were similar because both complainants had received an AHU notice which advised them about the applicable timeline for the EEO process. According to the Agency, its AHU notice defeated justifications based on mistaken belief. The Agency further states that Complainant's contacting the OIG about EEO matters was unsubstantiated. As to the discussions with the Director of Operations for Policy, the Agency insists that Complainant did not express a clear intention to file an EEO complaint and that the response did not incorrectly instruct him to initiate the EEO process through the AHU.

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.F.R. §1614.107(a)(2) allows an agency to dismiss a complaint that fails to comply with the applicable time limits contained in 29 C.F.R. §1614.105(a)(1), which, in turn, specifies that an aggrieved person must initiate contact with 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 45 days of the effective date of the action.

29 C.F.R. §1614.105(a)(2) states that the agency shall extend the 45-day time limit when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

We concur with the Agency in that, after March 8, 2023, when the Agency notified Complainant of the applicable timeline for initiating the EEO process, he failed to contact an EEO Counselor timely. As of that date, the AHU notice had advised Complainant as follows:

If you believe that your allegations are also the result of discrimination because of your race, sex (including pregnancy, sexual orientation or sexual stereotyping), color, national origin, age, disability, religion or genetic information, you may also file a concurrent complaint with the DHS-HQ Equal Employment Office (DHS-HQ EEO). The DHS-HQ EEO can be reached on 202-357-7700 or by email at hqeeo@hq.dhs.gov . You must contact the DHS-HQ [sic] withing [sic] **45 calendar days** of the alleged discriminatory act or when you became aware of the alleged discriminatory act.

Please note that although the investigation process utilized here will be prompt, thorough and impartial, it is separate from the EEO complaint process described in 29 CFR Part 1614. *The filing of a report of harassment with the DHS-HQ AHU does not preclude a concurrent filing of an EEO complaint nor does it toll any time limits associated with filing of such a complaint (emphasis added).*

As the Agency showed on appeal, the AHU notice distinguished the AHU process as separate from the EEO process and clarified to Complainant that he could file an EEO complaint concurrently with his AHU harassment report. The AHU notice sufficiently warned Complainant of the 45-day time limit for contacting the EEO Office and that filing a harassment report with AHU did not toll the time limits for filing an EEO complaint.

Therefore, upon thorough review of the record and appellate briefs, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact.

CONCLUSION

The Agency's final decision dismissing Complainant's complaint is AFFIRMED.

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

February 5, 2025
Date