



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Archie G.,¹
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture
(Food Safety and Inspection Service),
Agency.

Appeal No. 2024004497

Agency No. FSIS-2024-00253

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 2, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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 Food Inspector at the Agency's facility in Dallas, Texas. He resigned on November 28, 2023.

On May 28, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination and harassment on the bases of disability (mental and physical) and reprisal for prior protected EEO activity when:

1. on or about November 13 and 27, 2023, his former manager denied him union representation when he was issued two Letters of Caution;
2. on November 27, 2023, his former manager failed to submit his Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay Compensation;
3. on November 27, 2023, his former supervisor and manager denied his request to use available leave;
4. on November 27, 2023, and November 28, 2023, his former supervisor and manager issued him a Letter of Caution which contained their false statements; and
5. on November 28, 2023, he was forced to resign from his Food Inspector position.

The Agency dismissed the entire complaint pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact. Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant primarily addresses the untimely filing of his formal complaint, which he alleges is the result of the Agency providing him with outdated and conflicting addresses for complaint filing. He states this is a factor outside his control which prevented him from timely filing his formal complaint and resulted in the dismissal of his complaint. He also asserts that the EEOC may extend the time limit for filing a formal complaint if an employee can demonstrate that they were unable to meet the statutory deadline due to a mental or physical incapacitation that rendered them incapable of performing the necessary functions of their job. However, Complainant also asserts that on February 21, 2024, he was granted an extension to initiate his EEO complaint. Complainant states he contacted the EEO counselor within the time limit and he was granted an extension.

He further contends he “was not aware of the 45-day time limit, and there were circumstances and life changing events beyond his control that prevented a timely contact response from an EEO counselor, that granted the complainant’s extension.” Complainant contends he “initiated contact with the EEO Counselor on or before December 28, 2023 and on several occasions, respectively that led to the counselor untimely response to his emails and phone calls.”

The Agency contends on appeal that Complainant’s principal argument that his formal complaint was timely served is irrelevant as his complaint was dismissed for untimely initial EEO Counselor contact. The Agency further notes that although Complainant filed another brief in which he added a new bare assertion of timely initiating contact with an EEO Counselor, he presents no specific details nor evidence of any kind to support the claim, while the Agency’s extensive records, testimony, and evidence refute this new and unfounded claim. In support of their argument that Complainant’s EEO counselor contacted was untimely, the Agency provided an affidavit from Equal Opportunity Employment Specialist (who was also the EEO counselor assigned to Complainant’s case) who averred that Civil Rights Staff records all incoming contact to staff (whether via phone, email, or e-file) and according to their logs, Complainant did not contact the Agency’s EEO office between his prior EEO case of FSIS-2022-00594 and February 21, 2024. The affidavit further provided that Complainant never requested an extension to the date of initial EEO counselor contact. Her affidavit also stated that Agency training records show Complainant received No FEAR Act training on August 4, 2020 and March 4, 2022, which includes information regarding an individual’s responsibility to seek EEO counseling within 45 calendar days of any acts of alleged discrimination.

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

First, we note that the Agency did not dismiss the complaint for untimely filing, but instead for untimely EEO counselor contact. The dismissal specifically states that Complainant filed his formal EEO complaint on May 28, 2024. Thus, by the Agency's own admission, the formal complaint was timely filed. The Agency did not dispute this on appeal and in fact acknowledged again on appeal that they had deemed the formal complaint filed as of May 28, 2024. Therefore, we do not need to address Complainant's arguments regarding timely filing of the formal complaint.

Regarding the timeliness of Complainant's EEO counselor contact, 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's regulations provide that these time limits are subject to waiver, estoppel, and equitable tolling. 29 C.F.R. § 1614.604(f).

Here, the alleged acts of discrimination occurred on or before November 28, 2023. Thus, Complainant needed to contact an EEO counselor on or before January 12, 2024 to comply with the 45-day time limit. The record reflects Complainant contacted the Agency's EEO office on February 21, 2024, over a month late.

Complainant asserts that he contacted an EEO counselor prior to December 28, 2024, and that he contacted Equal Opportunity Employment Specialist, and was granted an extension by her, on or before February 21, 2024. He does not provide the date of his alleged contact or any other information to substantiate his contact (such as phone records or emails) or the granting of an extension (nor does he identify the date to which the extension was supposedly granted).

On multiple occasions, we have deemed complainants' "bare assertions" of timely EEO counselor contact insufficient to reverse a dismissal without concrete evidence that complainants initiated contact within the 45-day period. See, e.g., Bret E. v. Dep't of Transportation, EEOC Appeal No. 0120161763 (Jul. 27, 2016) (finding that complainant failed to provide sufficient justification to extend the 45-day window when the complainant did not submit evidence demonstrating that he initiated an electronic complaint "aside from his bare assertion"); Clyde B. Harvey v. Dep't of Justice, EEOC Appeal No. 01A23352 (Sep. 3, 2003) (upholding an agency's dismissal of a complaint for untimeliness when the complainant produced no evidence to support his claim that the agency's EEO office failed to respond to his earlier attempt at contact).

Complainant also alleges that mental or physical incapacity prevented him from timely contacting an EEO counselor. The Commission has consistently held, in cases involving physical or mental health difficulties, that an extension is warranted only where an individual is so incapacitated by his condition that he is unable to meet the regulatory time limits. See Davis v. U.S. Postal Serv., EEOC Request No. 05980475 (August 6, 1998). Claims of incapacity must be supported by medical evidence of incapacity. See Crear v. U.S. Postal Serv., EEOC Request No. 05920700 (Oct. 29, 1992) (complaints of decreased mental and physical capacity, without medical evidence of incapacity, does not warrant extension of time limits); cf. Maddux v. U.S. Postal Serv., EEOC Request No. 05980302 (Aug. 5, 1999) (psychiatrist's statement that complainant's mental condition rendered her unable to comprehend her legal rights and responsibilities during the relevant time frame was found sufficient to justify extension of time limit); Sohal v. U.S. Postal Serv., EEOC Request No. 05970461 (Apr. 24, 1997) (psychiatrist's statement that complainant's severe depression and anxiety rendered him unable to make decisions found sufficient to justify extension). Evidence that a complainant has sought treatment does not, without evidence of incapacity, justify an extension of time. See Galbreath v. Dep't of the Navy, EEOC Request No. 05980927 (Nov. 4, 1999) (evidence that complainant was under great mental stress, and received an evaluation/treatment, did not render the complainant incapacitated).

Complainant provided treatment records, but the records do not demonstrate incapacity.

We are also not persuaded by Complainant's arguments that he did not understand the No FEAR Act training due to his disabilities. Complainant has not provided any evidence that he requested a reasonable accommodation to help him access this training in either 2000 or 2022.

The Agency substantiated that Complainant's EEO counselor contact was untimely, but Complainant has provided only bare assertions for his arguments. Without further explanation and evidence, Complainant has not shown why the time limits in his case should be subject to waiver, estoppel or equitable tolling. As such, dismissal for untimely counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2) is appropriate.

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

January 13, 2025
Date