



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

[REDACTED]
Michelina C,¹
Complainant,

v.

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

Appeal No. 2024004619

Agency No. CHI-24-0349-SSA

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 23, 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.

ISSUES PRESENTED

Whether the Agency properly procedurally dismissed Complainant's complaint.

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 Disability Processing Specialist at the Agency's Great Lakes Program Service Center in Chicago, Illinois.

On July 17, 2023, the Agency placed Complainant on an Opportunity to Perform Successfully (OPS) Plan. On July 25, 2023, Complainant filed a grievance challenging her placement on the OPS Plan under the negotiated grievance procedure established by the Agency's collective bargaining agreement with Complainant's union. In February 2024, Complainant learned that her grievance had been denied at the third stage of that process.

On February 8, 2024, Complainant initiated EEO Counselor contact. Her issues were not resolved through informal counselling. On March 14, 2024, Complainant filed the instant formal complaint alleging that the Agency subjected her to discrimination based on sex and age when:

On July 17, 2023, management placed her on an OPS. Complainant also alleged that her telework schedule was modified, and that work credit and overtime hours was taken from her.

The Agency's final decision issued on May 23, 2024. Therein, the Agency dismissed the formal complaint, in accordance with 29 C.F.R. § 1614.107(a)(4), because Complainant had raised the same matters in a negotiated grievance procedure that permitted allegations of discrimination. Additionally, the Agency dismissed Complainant's complaint for untimely EEO Counselor contact under 29 C.F.R. §§ 1614.107(a)(2) and 1614.105(a)(1).

Complainant requested a hearing before an EEOC Administrative Judge (AJ) on June 14, 2024. On August 2, 2024, the AJ ordered Complainant's hearing request for dismissed for lack of jurisdiction, and noted that the Agency had informed Appellant of her appeal rights. The AJ referred this matter as an appeal to the Commission's Office of Federal Operations.

CONTENTIONS ON APPEAL

The instant appeal followed. On appeal, Complainant argues that she was unaware that she had to elect either the negotiated grievance process or the EEO process. Complainant also argues that she was had mistakenly believed that she could only file her EEO complaint after she had filed her grievance.

Complainant states that, because of this misunderstanding, she had delayed filing her EEO Complainant until after she had received an unfavorable decision on her grievance. Complainant further argues that her understanding of the EEO process was limited such that she did not know when or where she needed to initiate informal EEO counselling.

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. § 1614.301 requires that where a person is employed by an agency subject to 5 U.S.C. § 7121(d), and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in the negotiated grievance procedure, an election must be made to proceed under either the negotiated grievance procedure or the EEO complaint procedure but not both. An aggrieved employee who files a grievance in writing with an agency, whose negotiated agreement permits the inclusion of allegations of discrimination, may not thereafter file an EEO complaint on the same matter, irrespective of whether the agency has informed the individual of the need to elect, or whether the grievance actually raised allegations of discrimination. 29 C.F.R. § 1614.107(a)(4) provides that the agency shall dismiss a complaint where the complainant has elected to pursue the allegations under a negotiated grievance procedure.

Complainant filed a grievance requesting her removal from the OPS Plan on July 25, 2023, pursuant to a collective bargaining agreement (cba) that permits claims of discrimination to be raised in the grievance process or the EEO complaint process, but not both (Section 6(b) of the cba). The OPS Plan terminated her telework and prohibited her from working extended hours beyond a 40-hour work week. Complainant therefore elected to pursue her

claims in the grievance process first and therefore, the Agency properly dismissed the formal complaint pursuant to 29 C.F.R. §1614.107(a)(4).

CONCLUSION

The Agency's final decision to dismiss the formal complaint for the reason discussed above is AFFIRMED.²

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

² Because we affirm the Agency's dismissal for the reason discussed above, we find it unnecessary to address alternative dismissal grounds.

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

December 2, 2024

Date