



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

████████████████████
Kristofer E.,¹
Complainant,

v.

William P. Barr,
Attorney General,
Department of Justice,
Agency.

Appeal No. 2019005196

Agency No. EOI-2019-00531

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 2, 2019, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Legal Assistant, GS-8, at the Agency's Executive Office of Immigration Review (EOIR) facility in San Diego, California.

On April 5, 2019, Complainant made initial contact with the EOIR's Equal Employment Opportunity (EEO) Program. On May 1, 2019, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of race (Native American), sex, disability, and reprisal for prior protected EEO activity when, on April 1, 2019, Complainant became aware that the Agency had appointed others not in his protected group, without competition, to a position for which Complainant was rejected.

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.

The pertinent record shows that Complainant had applied for a position as a Legal Administrative Specialist under Vacancy Announcement EOIR-18-0073MP (GS 9/11/12 Legal Administrative Specialist positions). The area of consideration was limited to current federal employees. On August 31, 2018, the Agency notified Complainant of his non-selection for vacancy announcement EOIR-18-0073MP. Complainant was told that he was not selected because he lacked “the time-in-grade for promotion.” When he asked for reconsideration, he was assured that the Agency would post the position at a later time, at which time he could be eligible to compete.

On April 1, 2019, management announced that several contract employees had been appointed to civil service positions under EOIR-18-0073MP.² Complainant also became aware that the Agency was using the “Schedule A” hiring authority to make the appointments. It was also on or around April 1, 2019, Complainant learned that the Agency was appointing others outside his protected groups, who had no prior time-in-grade federal service, under the same vacancy announcement, for which Complainant had been rejected, using the Schedule A hiring authority.³ Complainant made EEO contact four days later.

On July 2, 2019, the Agency issued a final decision dismissing the complaint pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO contact. The Agency reasoned that Complainant was challenging the Agency’s August 31, 2018 notice to Complainant of his non-selection for vacancy announcement EOIR-18-0073MP and the subsequent denial of his request for reconsideration. The Agency stated that Complainant was aware of the alleged discrimination in the Schedule A hiring process before and during the application process. The Agency noted that Complainant had raised “related issues in late October of 2016, January 4, 2017, and on March 3, 2017.” The Agency recognized that Complainant was claiming that the Agency was denying him the favorable treatment granted to others, and that Complainant claimed that “it was “apparent that being ‘Schedule A qualified’ was being used as an end-run around those qualified to apply and to be considered for advancement to the new positions.” The Agency dismissed the complaint, reasoning that Complainant made EEO contact 162 days after he was notified that he was not selected.

This appeal followed. On appeal, Complainant stated that he had no reason to distrust the Agency’s stated reason for not selecting him (that he lacked the requisite time in grade), until he later learned that others were being appointed to the position without the requisite time in grade and that the Agency had engaged in a campaign to get CGI contractors “Schedule A certified” to allow for their appointment. Complainant contends that his EEO contact was timely made, because he “had no reason to believe that he was being discriminated against in favor of others outside his protected groups until the appointments were announced on April 1, 2019.

² Those federal contractors were not eligible to compete under the original announcement, because the area of consideration was limited to current federal employees.

³ The position announcement did not identify the position as a Special Emphasis Hiring (Schedule A) position. Complainant is “Schedule A Certified.”

This is when he learned that the Agency was appointing contract employees (without requiring them to compete through the regular process or to have the prior time in service), using a long-ago closed vacancy announcement that had not been open to outside applicants or announced as a Schedule A position. Complainant asserts that he made timely contact after he learned that the Agency was appointing others to promotional opportunities not provided to him.

The Agency did not file a brief in response to the appeal.

ANALYSIS AND FINDINGS

The regulation at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint which fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.106, which, in turn, requires that Complainants make EEO contact within 45 days of the date of the alleged discrimination.

Complainant learned on April 1, 2019, that others had received a benefit allegedly denied to him. He made EEO contact four days later, alleging that the Agency provided others not in his protected groups an appointment and non-competitive advantage denied to him.

We note that Complainant did not learn that others outside his protected groups were provided advantages and held to a lower standard than he had been until the announcements were made. Complainant is alleging that the Agency deprived him of the promotional opportunities and advantages that the Agency provided to others months after the announcement closed. The Agency also acknowledged, in its dismissal decision, that the record included “evidence of additional hires weeks and months after the vacancy closed.” The Agency concluded that such evidence “is more aptly considered supportive facts” and not a valid argument for Complainant’s untimely contact” with an EEO Counselor. We disagree.

We find that Complainant did make timely EEO contact once he became aware of the Agency’s actions on April 1, 2019, to challenge the Agency’s alleged ongoing denial of advancement to him, while providing others with favorable appointments without competition. Moreover, when there is an issue of timeliness, the burden is on the Agency to show that the EEO contact was untimely. We find that the Agency failed to make the requisite showing. For these reasons, we find that Complainant’s complaint was improperly dismissed.

CONCLUSION

Accordingly, we REVERSE the Agency’s final decision dismissing Complainant’s complaint. We REMAND the complaint to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. 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, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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 his or her 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 14, 2020

Date