



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

[REDACTED]  
Cleotilde G,<sup>1</sup>  
Complainant,

v.

Dr. Mark T. Esper,  
Secretary,  
Department of Defense,  
Agency.

Appeal No. 2020000305

Agency No. 2019-WHSPFPA-079

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (Dismissal) dated October 4, 2019, 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Police Officer, AD-00834-07 at the Agency's Pentagon Force Protection Agency facility in Washington DC.

On September 19, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of sex (female) when, on May 20, 2019, Complainant was not selected for the position of Police Officer (High Risk Personnel and Executive Driver), AD-0083-07, under Vacancy Announcement #ST-10418202-19-AB.

The Agency dismissed the claim for untimely EEO Counselor contact. The instant appeal followed.

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<sup>1</sup> 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.

### ANALYSIS AND FINDINGS

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. Department 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-selection on May 20, 2019, but did not contact an EEO Counselor until August 10, 2019, which is beyond the 45-day limit. Complainant argues that she did not learn of the discrimination until "six weeks later" when she found out that the selectee for the position was a male. The Agency argues that Complainant should have developed reasonable suspicion of discrimination on May 20 when she received notice of her non-selection. We note, however, that the Agency fails to explain why such a notice of non-selection should have reasonably aroused Complainant's suspicion of discrimination based on sex.

The Agency cites to two cases to support its argument that in non-selection cases the 45-day time limit for contacting an EEO Counselor begins when the complainant is notified of the non-selection. We find however, that the Agency's argument is unsupported by our caselaw and that the Agency misconstrues the cases in question. We note in this regard that neither of the cases cited by the Agency, Bean v USPS, EEOC Appeal No. 01962367 (November 6, 1996) and Taylor v. Mabus, 685 F. Supp. 2d 94 (D.D.C. 2010), involves a complainant arguing that he only developed reasonable suspicion of discrimination days or weeks after receiving notice of his non-selection, as Complainant argues here. Indeed, in both Bean and Taylor the complainant argued that he never received the Agency's notification of the non-selection at all, unlike the instant case.

In Bean, in an attempt to push the date of the discriminatory incident to a date earlier than 45 days before the complainant's counselor contact, it was the agency, not the complainant, making the argument regarding reasonable suspicion, maintaining that the complainant developed reasonable suspicion early, during the job interview, based on discriminatory comments made during the interview, and that the decision not to hire him also occurred at the interview. Given such a scenario, we held that contrary to the Agency's argument that the complainant's non-selection occurred at the interview, the time period for contacting a Counselor ran when the complainant learned of the non-selection. We also found, however, that the agency had not shown the complainant had been notified of the non-selection and thus had not shown the complainant's Counselor contact was untimely. The determination regarding when reasonable suspicion began did not enter into our analysis.

While we held in Bean that in non-selection cases the time limit for contacting a Counselor occurs when the complainant is notified of the non-selection and not at an earlier date, such a holding does not necessarily apply to situations, as in the instant case, where the Agency is not arguing that the time limit should begin to run at a date prior to Complainant being notified of the non-selection.

Similarly in Taylor, the court's decision did not turn on when the complainant developed reasonable suspicion. Instead the court disbelieved the complainant's claim that he was never notified of the non-selections at issue and thus found his Counselor contact to have been untimely. Again, the determination regarding when reasonable suspicion began did not enter into the analysis. As such we find both Bean and Taylor to be inapposite to the instant case.

Our regulations state that the 45-day time period "may be extended when the complainant shows that . . . that she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred." § 1614.105(a)(2). As such the regulations clearly allow for situations where a complainant only learns that a personnel actions was discriminatory at some later date. Where the complainant shows she learned of the discrimination days or weeks 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. Postmaster General, EEOC Request No. 01952036 (1996).

Here, Complainant maintains that what she learned was that the selectee was of a different sex than herself, thus arousing reasonable suspicion of sex discrimination at the moment she learned of the selectee's sex, 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 sex discrimination prior to the time she learned the selectee was of a different sex than herself. Complainant further maintains she learned of the selectee's sex, and thus developed reasonable suspicion of sex discrimination, "six weeks" after she received the notification of her nonselection. Six weeks after May 20, 2019 is July 1, 2019. Her Counselor contact on August 10, 2019, was thus within the 45-day time period of the time she developed reasonable suspicion. Because her Counselor contact occurred within 45 days of her developing reasonable suspicion of discrimination, we find Complainant's Counselor contact to have been timely.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Dismissal and REMAND the claim for further processing in according 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 CFR § 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.

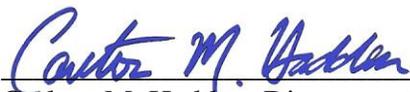
In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency 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

February 11, 2020

Date