



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

[REDACTED]
Tiffanie S.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2020000484

Agency No. 200305202019104474

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's October 18, 2019, dismissal of 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 was employed by the Agency as a Lead HR Specialist, GS-13, for the Gulf Coast Veterans Healthcare System, VAMC located in Biloxi, Mississippi.

On September 5, 2019, Complainant filed a Formal Complaint alleging that the Agency subjected her to discrimination on the bases of race (African-American) and reprisal (engaging in prior protected EEO activity)² when:

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.

² EEOC Hearing Nos. 410201600532X and 420201900405X (pending).

- A. On or about May 3, 2019, the Assistant Chief, Human Resources ("AC"), told Complainant that she was not recommending her for an Annual Performance Award for her FY17-18 rating period, even though the award had been previously recommended by Complainant's former supervisor ("S1"), and,
- B. On or about May 3, 2019, AC told Complainant that she was not recommending her for a quality step increase ("QSI"), also previously recommended by S1.

The Agency dismissed Claim A for failure to state a claim under 29 C.F.R. § 1614.107(a)(1), and dismissed Claim B on timeliness grounds, pursuant to 29 C.F.R. § 1614.107(a)(2).

ANALYSIS AND FINDINGS

In relevant part, 29 C.F.R. §1614.107(a)(2) states that an agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105. Under §1614.105(a)(1), an aggrieved person must initiate contact with an EEOC 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.

The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 45 day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 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. (Complainant v. United States Postal Serv., EEOC Appeal No. 0120120499 (April 19, 2012)).

Under 29 C.F.R. §1614.105(a)(2), the agency or the Commission may extend the time limit if complainant establishes that she was not aware of the time limit, 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 EEO Counselor within the time limit, or for other reasons considered sufficient by the agency or Commission.

Both of the alleged discriminatory acts in Claims A and B occurred on or about May 3, 2019, yet, Complainant did not initiate contact with an EEO Counselor until July 8, 2019, which falls beyond the 45 day limitation period.

Complainant states that she lacked reasonable suspicion of discrimination when, on or about May 3, 2019, AC told Complainant that she would receive neither the Annual Performance Award FY-17/18 (Claim A) nor the QSI (Claim B). Believing AC's decision on the QSI was an error, Complainant requested an explanation. After receiving no further information from AC, Complainant wrote a follow up email on May 29, 2019, and AC still did not respond.

On appeal, Complainant argues that reasonable suspicion was triggered on May 29, 2019, when she still had not received an explanation from AC. However, Complainant acknowledges that she did not believe AC's decision for the issues in both Claims A and B was correct at the time she confirmed it on May 3, 2019. With respect to Claim A specifically, Complainant was aware that her colleagues received the award a year earlier, and she already had a pending EEO complaint addressing AC's failure to grant another award for FY-17/18. Under the circumstances, we find reasonable suspicion of discrimination existed for both Claims A and B on or about May 3, 2019, when Complainant learned definitively from AC that she would not recommend her for an Annual Performance Award for FY-17/18 or a QSI regardless of S1's prior recommendation and Complainant's outstanding performance record.

To the extent Complainant attributes her delay in EEO counselor contact to waiting for an explanation from AC, we are not persuaded to waive the limitation period on these grounds. The Commission has consistently held that the utilization of agency procedures, and other remedial processes do not toll the time limit for contacting an EEO Counselor. See Ellis v. United States Postal Serv., EEOC Appeal No. 01992093 (Nov. 29, 2000).

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is **AFFIRMED**.

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).

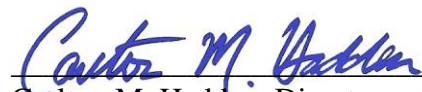
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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 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. 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 24, 2020
Date