



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

[REDACTED]
Felton S,¹
Complainant,

v.

Kevin K. McAleenan,
Acting Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2020003087

Hearing No. 520-2019-00466X

Agency No. HS-TSA-02029-2018

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated March 26, 2020, implementing the AJ's dismissal of a formal 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

During the period at issue, Complainant worked for the Agency as a Federal Air Marshal in Boston, Massachusetts. On August 20, 2018, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of sex (male), disability, and in reprisal for prior protected EEO activity.

By letter dated September 12, 2018, the Agency requested clarification from Complainant's attorney regarding the reasons Complainant's formal complaint was not filed within 15 days.

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.

On September 28, 2018, Complainant's attorney responded to the Agency's clarification request. Therein, Complainant's attorney set forth that she was solely hired to work on Complainant's prior complaint (Agency Case No. HS-TSA-24285-2015), unless the instant complaint was consolidated with the prior complaint. Complainant's attorney also stated that on June 29, 2018, a request was made for the instant matter to be consolidated with Agency Case No. HS-TSA-24285-2015.

By letter dated November 19, 2018, the Agency accepted the instant formal complaint for investigation. In its acceptance letter, the Agency stated "[b]ecause the Complainant's former attorney provided clarification for the time delay and pursuant to the principle of equitable tolling, the Agency excused Complainant's delay and accepts the complaint for investigation." Upon completion of the Agency's investigation, the Agency requested a hearing before an EEOC Administrative Judge (AJ).

The Agency filed a Motion to Dismiss on December 4, 2019. Therein, the Agency requested that the AJ dismiss the instant formal complaint on the grounds his formal complaint was untimely filed. The Agency reasoned that both Complainant and his attorney received the Notice of Right to File a Formal Complaint on July 30, 2018, but that Complainant did not file his formal complaint until August 20, 2018, outside of the applicable time period.

In response, Complainant requested that his formal complaint not be dismissed. He asserted that "the Agency's motion does not even mention the fact the Agency granted equitable tolling." Complainant also asserts that he demonstrated an intent to pursue the formal process by requesting a consolidation of the instant matter with a prior complaint pending before an EEOC AJ.

In a March 20, 2020 decision, the EEOC AJ granted the Agency's Motion to dismiss on the grounds the formal complaint was untimely filed. The AJ reasoned that Complainant's formal complaint was filed outside of the applicable time period and noted that "the Commission has consistently held that the mere acceptance of a complaint by an agency does not preclude the later dismissal of the complaint on timeliness grounds." AJ Decision at 2.

The Agency issued a final order implementing the AJ's decision.

The instant appeal followed. On appeal, Complainant addresses the merits of his complaint.

In response, the Agency requests that we affirm its final order. The Agency states "in any case pending before [an EEOC AJ], an Agency's civil rights office already has accepted the formal EEO complaint for investigation and investigated it. Regardless of the actions of civil rights offices, however, [EEOC AJs] regularly dismiss untimely formal complaints. Agency Response Brief at 9.

ANALYSIS AND FINDINGS

We find that the Agency and AJ improperly dismissed the formal complaint on the grounds it was untimely filed. EEOC Regulation 29 C.F.R. § 1614.106(b) requires the filing of a written complaint with an appropriate agency official within fifteen (15) calendar days after receipt of the notice of the right to file a formal complaint. 29 C.F.R. § 1614.107(a)(2) provides that the agency shall dismiss a complaint that fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106, and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c). 29 C.F.R. § 1614.604(c) provides that the time limits “are subject to waiver, estoppel, and equitable tolling.”

Given the specific circumstances in this matter, we find the Agency, in its November 19, 2018 acceptance letter, *explicitly* extended the applicable time limit and applied the principle of equitable tolling pursuant to 29 C.F.R. 1614.604(c). We acknowledge that the EEO regulations provide that an EEOC AJ may dismiss a complaint on procedural grounds. The Agency cites to various cases, in its response brief, in which an agency initially accepted a complainant’s formal complaint for investigation which was subsequently dismissed by an EEOC AJ on procedural grounds. We determine, however, that the instant matter differs from those cited cases.² The instant matter does not involve a mere acceptance of Complainant’s formal complaint for investigation. Rather, as set forth above, the Agency, in its acceptance letter, explicitly stated it was extending the time limit and applying the principles of equitable tolling. The Commission has specifically held that an agency can raise the issue of timeliness at the administrative hearing stage absent a specific waiver of the limitation period. See Rice v. Federal Deposit Insurance Corp., EEOC Request No. 05970082 (May 15, 1997). Here, the Agency’s explicit language in its acceptance letter was not a mere acceptance of Complainant’s complaint for investigation but a specific waiver of the limitation period. Based on the foregoing and the specific circumstances of this case, we find that the dismissal of Complainant’s formal complaint on the grounds it was untimely filed to be improper.

Accordingly, we REVERSE the Agency’s final action implementing the AJ’s decision dismissing Complainant’s complaint and we REMAND this matter for a hearing in accordance with the ORDER below.

ORDER

Within 15 calendar days of the date this decision is issued, the Agency shall submit a renewed request for a hearing, a copy of this appellate decision, and the complaint file to the Hearings Unit of the EEOC’s Boston Area Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit.

² The Agency cites to Complainant v. Dep’t of Homeland Sec., EEOC Appeal No. 0120140656 (Dec. 11, 2014); Complainant v. Dep’t of Justice, EEOC Appeal No. 0120141191 (May 23, 2014), and Irene W. v. Dep’t of Agric., EEOC Appeal No. 0120150020 (Nov. 10, 2015).

Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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)

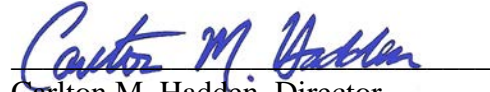
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

June 25, 2020

Date