



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

[REDACTED]
Shan D.,¹
Complainant,

v.

Andrew M. Saul,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2020003438

Agency No. HQ-20-0121-SSA

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 16, 2020, 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 for a staffing firm, Metro Mail Services (the Contractor) at the Agency's Office of Appellate Operations facility in Falls Church, Virginia.

On January 28, 2020, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination and harassment (non-sexual) on the bases of race (African-American), sex (female), and reprisal for prior protected EEO activity when:

1. on August 25, 2017, management of the Contractor sent a separation letter to Complainant to permanently remove her from the Agency's contract; and
2. from December 2015 through August 25, 2017, in terms of working conditions, including disparaging remarks, insulting name calling, and disrespectful behavior from co-workers, and management's refusal to address complaints.

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 Agency dismissed both claims, pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact, finding that Complainant first contacted the EEO counselor more than 45 days after the alleged actions. The Agency also dismissed the claims pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim, finding that Complainant was not a federal employee and, therefore, lacked standing to file a complaint with the Agency.

The instant appeal followed. On appeal, Complainant acknowledges that she did not file the instant complaint within 45 days of the alleged incidents, but she argues that the time limit should be tolled or waived. She also argues that the record is insufficient to determine the nature of her employment relationship with the Agency and asks that we remand the complaint for an investigation. In response, the Agency reiterates its contentions and asks that we affirm its final decision dismissing the complaint.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should 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 personnel action, within forty-five (45) days of the effective date of the action.

Here, the alleged events occurred from December 2015 to August 25, 2017. The record shows that Complainant initially contacted on EEO Counselor on October 25, 2019, which is over two years after the occurrence of the last alleged event. Complainant argues that the 45-day time limit should be extended because she was not aware of time limit and the Agency's actions caused her delay in contacting an EEO Counselor.

EEOC Regulation 29 C.F.R. § 1614.105(a)(2) provides that the agency or the Commission shall extend the time limits when the individual shows that she was not notified of the time limits and was not otherwise aware of them, that she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence she was prevented by circumstances beyond her control from contacting the EEO Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. See also, 29 C.F.R. §1614.604(c) (time limits are subject to waiver, estoppel and equitable tolling).

The Agency argues that Complainant had constructive knowledge of the relevant time limit because the Agency posted information at each work site depicting the regulatory timeframe for contacting an EEO Counselor. The Commission has held that constructive knowledge will be imputed where an agency has fulfilled its statutory obligation by posting notices informing employees of their rights and obligations under EEO regulations, as long as the record contains sufficient information from which the Commission could find that the poster contained notice of the time limit for initiating EEO counseling. See Yashuk v. U.S. Postal Service, EEOC Request No. 05890382 (June 2, 1989); and see Pride v. U.S. Postal Service, EEOC Request No. 05930134 (August 19, 1993), citing Polsby v. Shalala, 113 S. Ct. 1940 (1993).

Here, the record contains a statement from the Agency's Contract Officer Representative, attesting that the Agency posted notice of the relevant EEO regulations, including the 45-day time limit to contact an EEO Counselor, and it was posted in the worksite to which Complainant reported since at least November 2015. We find this sufficient to find Complainant had constructive knowledge of the relevant time limit.

Regarding Complainant's argument that she failed to contact an EEO Counselor because the Agency misled her, the Commission has tolled limitation periods because there were agency actions that mislead an individual concerning his/her EEO rights. See, e.g., Herrera v. U.S. Postal Service, EEOC Request No. 05891351 (September 28, 1989) and Ong v. Department of the Army, EEOC Request No. 05880290 (August 8, 1988). Here, however, there is little support for Complainant's allegations. Moreover, the Commission has consistently held that a complainant must act with due diligence in the pursuit of her claim or the doctrine of laches may apply. See Becker v. United States Postal Service, EEOC Appeal No. 01A45028 (November 18, 2004) (finding that the doctrine of laches applied when complainant waited over two years from the date of the alleged discriminatory events before contacting an EEO Counselor); O'Dell v. Department of Health and Human Service, EEOC Request No. 05901130 (December 27, 1990). The doctrine of laches is an equitable remedy under which an individual's failure to pursue diligently her course of action could bar her claim. Here, Complainant waited over two years from the date of the latest alleged discriminatory event before she contacted an EEO counselor. Therefore, we find the doctrine of laches applies and she has failed to provide sufficient justification for extending or tolling the time limit.

Because we find the dismissal of the complaint was warranted, we decline to address the Agency's other reasons for dismissal.

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her 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 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, 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 his or her 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(c).

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

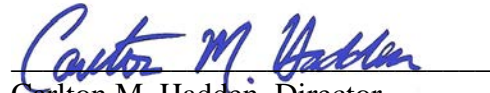
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

November 16, 2020

Date