



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

[REDACTED]
Marquis K.,¹
Complainant,

v.

Chad F. Wolf,
Acting Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2020004187

Hearing No. 410-2019-00447X

Agency No. HS-TSA-01804-2018

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 9, 2020, 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.

BACKGROUND

During the period at issue, Complainant worked as a Transportation Security Officer at the Agency's Hartsfield Jackson International Airport facility in Atlanta, Georgia.

On July 23, 2018, Complainant filed a formal complaint alleging that the Agency subjected him to unlawful retaliation for engaging in prior EEO complaint activity. By letter dated August 16, 2018, the Agency accepted the formal complaint and determined that it was comprised of the following claims:

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.

1. On March 21, 2018, management revoked Complainant's screening duties; and
2. On March 28, 2018, a manager threatened to terminate Complainant under the "one-step" removal process.

Upon completion of the investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). On March 3, 2020, the Agency filed a Motion to Dismiss. Therein, the Agency asserted that the formal complaint should be dismissed for untimely EEO Counselor contact. The Agency reasoned that Complainant did not initiate EEO contact until May 21, 2018, outside of the applicable time period.

On April 29, 2020, the AJ issued an Order of Dismissal dismissing the matter for untimely EEO Counselor contact. In her decision, the AJ noted that Complainant responded to the Agency's Motion to Dismiss verbally during the Initial Conference. The AJ set forth that Complainant asserted that on March 29, 2018, he had contacted an EEO Counselor (EC1) from which he had received EEO Counseling on a prior EEO matter.

The AJ dismissed Complainant's complaint for untimely EEO Counselor contact reasoning as follows:

Complainant contacted an EEO Counselor [EC1] he worked with for a previous case, a day after one of the alleged incidents in this complaint occurred. Approximately, two weeks later, EC1 informed Complainant that he would need to seek separate EEO Counseling for the issues in the instant complaint. At the time Complainant received notice from [EC1] that he needed to initiate separate EEO counseling for the instant complaint, he had approximately 27 days remaining to meet the 45-day regulatory deadline of May 12, 2018. Complainant did not seek EEO Counseling until May 21, 2018, 54 days after the date of the incident.

The Agency issued a final action on June 9, 2020 implementing the AJ's Order of Dismissal.

The instant appeal followed.

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 a personnel action, within forty-five (45) days of the effective date of the action.

In response to Complainant's appeal, the Agency requests we affirm its final decision dismissing Complainant's complaint for untimely EEO Counselor contact. The Agency reasons:

Complainant's only contention as to why his timeliness should be excused is that he contacted an EEO Investigator [EC1] who handled one of his previous EEO complaints. However, Complainant explained during the Initial Conference in this matter that on or about April 13, 2018, [EC1] informed Complainant that he needed to seek separate EEO counseling in the claims he was asserting. Despite acknowledging being expressly informed well within the forty-five day regulatory window to make separate EEO contact, Complainant inexplicably waited until May 21, 2018 to contact the Agency's Civil Rights Office.

To establish EEO Counselor contact, an individual must contact an agency official logically connected to the EEO process and exhibit intent to begin the EEO process. See Allen v. U.S. Postal Serv., EEOC Request No. 05950933 (July 9, 1996). On March 29, 2018, Complainant timely initiated EEO Counselor contact by contacting someone logically connected to the EEO process with the intent to initiate the EEO process. The record contains an email from Complainant to EC1, an Agency EEO Counselor, dated March 29, 2018. The email had the subject "new allegation." Complainant stated in the March 29, 2018 email "reprisal-3/28/2018 [a named Agency official]...set me down for conversation about one step removal...She made statement ...I can't work in operation...."

We find that Complainant's March 29, 2018 email was sent to an EEO Counselor (EC1),² thus someone logically connected to the EEO process. Commission records reflect that EC1 was the EEO Counselor in a prior EEO case for Complainant, Agency Case No. HS-TSA-00149-2018, which is currently pending before us on appeal, EEOC Appeal No. 2020000423. In addition we find that this email from Complainant exhibited an intent to begin the EEO complaint process. In his March 29, 2019 email, Complainant listed the subject of the email "new allegation," listed the basis of reprisal and the practices at issues (being informed he could not work in the operation and being subject to the one-step removal process). While the AJ asserted that Complainant in his verbal response to the Agency's Motion stated that EC1 informed him around April 13, 2018 via telephone that he would need to initiate separate EEO Counseling, this does not alter our finding that Complainant's initial EEO contact *occurred on March 29, 2018* (via his email to EC1) in which he contacted someone logically connected to the EEO process with the intent to begin the EEO process. We find that EC1, an EEO Counselor, should not have told Complainant that he needed to initiate contact again but rather should have either opened a new EEO case for Complainant with March 29, 2018, being the date of initial EEO contact or forwarded Complainant's email to another EEO Counselor for counseling with March 29, 2018 being the initial EEO contact date. Based on the foregoing, we find that Complainant timely initiated EEO contact on March 29, 2018.

² The Agency, in its response brief, sets forth that EC1 was an EEO Investigator in a prior EEO case for Complainant. However, Commission records for a prior EEO case of Complainant's, Agency Case No. HS-TSA-0019-2018, reflects that EC1 was an EEO Counselor, not an EEO Investigator.

Accordingly, we REVERSE the Agency's final action implementing the AJ's decision dismissing Complainant's complaint EEO for untimely EEO Counselor contact 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 Atlanta District 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. 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 (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 (R0610)

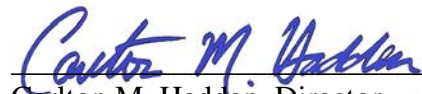
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

November 23, 2020

Date