



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

[REDACTED]  
Emelda F.,<sup>1</sup>  
Complainant,

v.

Ryan D. McCarthy,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2020004414

Agency No. ARBELVOIR20FEB00973

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 26, 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Child and Youth Program Assistant, CY-1702-01 at the Agency's Child Development Center facility in Fort Belvoir, Virginia.

On June 11, 2020, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of national origin (Ghana) and disability when:

1. On or about January 7, 2020, Complainant discovered that she was entitled to but did not receive a retroactive pay increase and an increase to skill level 3 with an effective date of January 24, 2019.

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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.

2. On or about January 7, 2020, Complainant discovered that she was entitled to but did not receive back-pay since January 2019.
3. On or about January 7, 2020, Complainant discovered that she was entitled to but did not receive a time-off award of eight (8) hours with an effective date of October 3, 2019.

The Agency characterized the claims differently and dismissed the claims for failure to state a claim and for untimely EEO Counselor contact. Specifically, the Agency found that Complainant's discovery of her entitlement to the retroactive pay increase and time off award did not render her aggrieved. The Agency did not address the matter of Complainant's entitlement to an increase to skill level 3. The Agency further found that Complainant developed reasonable suspicion on January 7, 2020, and hence her March 2, 2020 Counselor contact was untimely.

### ANALYSIS AND FINDINGS

#### *Failure to State a Claim*

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in part, that an Agency shall dismiss a complaint that fails to state a claim. An Agency shall accept a complaint from any employee or applicant for employment who believes he or she has been discriminated against by that Agency because of race, color, religion, sex, national origin, age, disabling condition, genetic condition, or reprisal. 29 C.F.R. §§ 1614.103, 106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (April 21, 1994). In addition, we note that Complainant has alleged claims of reprisal. The Commission interprets the statutory retaliation clauses "to prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual, Section 8 (Retaliation) at 8-13, 8-14 (May 20, 1998).

Complainant contends that on or about January 7, 2020, she discovered a DA Form 3434 dated November 13, 2019, in her MyBiz account which provided for a retroactive pay increase from \$14.02 to \$15.45 per hour and an increase to skill level 3 with an effective date of January 24, 2019. She further found a DA Form 3434 dated November 13, 2019, which provided for a time-off award of eight (8) hours with an effective date of October 3, 2019. In her Formal complaint, Complainant contends that "the Agency has subjected her to continuing violations by failing to timely provide her with pay increases and with back for [sic] retroactive pay increases since on or about January 19, 2019." As such, we read Complainant's claim to be alleging that she was not timely provided the pay increase, and did not receive back pay or a time-off award. The Agency found that Complainant's claims fail to state a claim. We disagree.

Following a review of the record, we find that Complainant has alleged she suffered a present harm when was not provided a pay increase, a time-off award, and back pay to which she was entitled.

We further find Complainant has alleged a valid claim of reprisal because we find that being denied such benefits based on a retaliatory motive are actions that are likely to deter Complainant or others from engaging in protected activity.

The Agency argues on appeal that Complainant's raise has been implemented since on or about September 5, 2019, and that she received a lump-sum back pay award on March 18, 2020. Accordingly, the Agency argues, Complainant fails to state a claim. We note, however, that such an argument addresses the merits of Complainant's complaint without a proper investigation as required by the regulations. Any argument that the alleged action has since been corrected is irrelevant to the procedural issue of whether Complainant has stated a justiciable claim under Title VII and the Rehabilitation Act. See Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. U.S. Postal Serv., EEOC Request No. 05930220 (Aug. 12, 1993); Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991).

#### *Timeliness of EEO Counseling Contact*

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination 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 to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Appeal No. 01965648 (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.

In its Dismissal, the Agency argues that because Complainant learned of her entitlement to a pay raise and time-off award on January 7, 2020, her March 11, 2020 EEO Counselor contact was untimely because it was beyond the forty-five (45) day limitation period.

#### *Pay Raise and Back Pay*

With regard to the Complainant being denied a pay raise and being entitled to back pay, we find that Complainant's EEO Counselor contact was timely under the Lilly Ledbetter Fair Pay Act (Ledbetter Act), Pub. L. No. 111-12, 123 Stat. 5. The Ledbetter Act applies to all claims of discrimination in compensation, pending on or after May 28, 2007, under Title VII, the Rehabilitation Act, and the Age Discrimination in Employment Act. With respect to Title VII claims, Section 3 of the Ledbetter Act provides that:

An unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including

each time wages, benefits, or other compensation is paid, resulting in whole or part from such a decision or other practice.

Here, Complainant's EEO contact was timely because, as a current Agency employee, it was within 45 days of her receiving a paycheck. While the Agency, on appeal, argues that Complainant admits in her Appeal Brief that she developed reasonable suspicion concerning the pay raise sometime between April and August of 2019, making her March 2020 Counselor contact untimely, we note that pursuant to the Ledbetter Act, the issue of whether or not Complainant developed reasonable suspicion on some earlier date is irrelevant.

#### *Time-Off Award*

With regard to the denial of Complainant's time-off award, we note that, there is nothing in the record to suggest Complainant developed reasonable suspicion about such an award prior to January 7, 2020. Complainant's comment in her Appeal Brief regarding the fact she made inquiries to her supervisor between April and August 2019 references back pay, not the time-off award. We note that on January 17, 2020, Complainant sought to amend an existing Complaint under Agency No. ARBELVOIR19SEP03565 to include both the pay raise issue and the time-off award. On January 29, 2020, the Agency dismissed Complainant's attempt to amend pursuant to 29 C.F.R. § 1614.107(2) on the grounds that these new matters were not brought to the attention of the EEO Counselor and were not like or related to matters brought before the Counselor. The Agency incorrectly provided Complainant with appeal rights to this Commission and notified Complainant that she had 30 days to appeal the dismissal.

Instead of appealing, Complainant contacted an EEO Counselor on March 11, 2020. In the instant dismissal decision, the Agency found that because Complainant developed reasonable suspicion on January 7, 2020, her March 11, 2020 Counselor contact was untimely. Following a review of the record, we disagree. We find that Complainant's January 17, 2020 attempt to amend her existing complaint placed the Agency on notice that she wished to pursue this matter and hence her attempt to amend shall be deemed to constitute EEO Counselor contact for purposes of timeliness. As such we find that Complainant's Counselor contact was timely with regard to the matter of her time-off award.

On appeal, the Agency argues that Complainant should have appealed the January 29, 2020 dismissal of her attempt to amend her complaint. We note, however, that pursuant to 29 C.F.R. §1614.107(b) Complainant's right to appeal the dismissal of her attempt to amend is not appealable until the final decision on Complainant's underlying complaint under Agency No. ARBELVOIR19SEP03565. The Agency therefore erred in its January 29, 2020 Decision when it granted Complainant 30-day appeal rights to this Commission and we find no error on Complainant's part by failing to appeal the dismissal of her attempt to amend.

### 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 claims 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 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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](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, a 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).

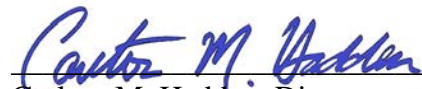
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

January 14, 2021  
Date