



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Mitchell M.,¹
Complainant,

v.

Antony J. Blinken,
Secretary,
Department of State,
Agency.

Appeal No. 2021001243

Agency No. DOS-0288-20

DECISION

On November 11, 2020, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an October 13, 2020 final Agency decision (FAD) dismissing his complaint of employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

Complainant, a U.S. citizen, was hired by the Agency starting on February 24, 1997, to a limited term position as a Commercial Representative at the American Consulate General, Office of the Foreign Commercial Service, in Dusseldorf, Germany. The term appointment allowed for the option of subsequent annual extensions. It appears the Agency annually renewed Complainant's term employment until he retired on October 31, 2017. In July 2009, Complainant was reassigned from Dusseldorf to Munich, Germany, where he remained until his retirement. Throughout his career with the Agency's U.S. Mission Germany, Complainant worked as Locally Employed (LE) Staff, meaning staff who were legal permanent residents of Germany.

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 July 23, 2020, Complainant initiated EEO counseling and later filed a formal equal employment opportunity (EEO) complaint dated August 26, 2020, alleging the Agency discriminated against him based on his age because he was ineligible, due to being hired after his 45th birthday, to participate in Part A of the Mission Germany Retirement Benefit Plan/Defined Benefit Plan (DBP) for LE Staff.

Part A provided old age, disability, and survivor annuities for non-temporary LE Staff in the plan. All costs were borne by the U.S. Government. Non-temporary LE Staff automatically became participants of DBP Part A following five years of credible Agency service so long in relevant part they did not enter U.S. Government service after their 45th birthday. While benefits are paid by a private German insurance company, the legal entitlement to them remained with the U.S. Government.

Effective March 31, 2019, Mission Germany replaced DBP with a Defined Contribution Plan (DCP) for LE Staff. With DCP, the U.S. Government contributed 3%, and the employee could contribute up to the legal limit under German law. DCP had no exclusion on participation based on hire age. Eligible participants, however, only included those hired *after* January 25, 2015, the date Mission Germany suspended DBP for newly hired LE Staff.

The Agency dismissed Complainant's EEO complaint because he did not initiate EEO counseling within the 45-day time limit of when he reasonably should have suspected discrimination. The Agency found that, at the latest, Complainant should have reasonably suspected discrimination when he retired on October 31, 2017, because he did not qualify for retirement benefits at that point. It further found that assuming Complainant did not reasonably suspect discrimination upon his retirement, he should have reasonably suspected discrimination when, on February 26, 2020, via cable (identified as 20 STATE 21066), Agency leadership denied the request by similarly situated former LE Staff, also hired after age 45, for retirement benefits. The Agency found that Complainant knew or had constructive notice of the 45-day time limit because of posted notices on the Agency's intranet and internet sites dedicated to employment information. The complaint file contains screen shots of the referenced notices.

The Agency also dismissed the complaint for failure to state a claim because: (i) as Complainant was ineligible for DBP upon starting his employment as LE Staff for Mission Germany as evidenced by the Local Compensation Plan he received and signed for then, his continued ineligibility does not constitute a loss of a term, condition, or privilege of employment; (ii) his EEO complaint arises under the Foreign Service Act, which gives the Agency authority at 22 U.S.C. § 3968 to make payments for LE Staff to a financial institution to finance benefits for them and the EEOC has no jurisdiction over this statute; and (iii) the EEO complaint constitutes a collateral attack on an internal grievance process he used that resulted in the unfavorable decision in the above referenced cable. The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC regulations provide that an aggrieved person must seek EEO counseling within 45 days of the date of the alleged discriminatory action, or in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1) & .107(a)(2). This time period may be extended when the individual shows that she was not notified of the time limit and was not otherwise aware of it, or that she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred. *Id.*, at § .105(a)(2). The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. Howard v. Department 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.

Timeliness – Reasonable Suspicion

It is undisputed that Complainant first sought EEO counseling on his exclusion from retirement benefits on July 23, 2020, nearly three years after he retired from the Agency on October 31, 2017.

Complainant argues on appeal that he was never informed during his employment about the DBP retirement plan and did not know of its existence when he retired. He represented in his complaint that he only learned of the age exclusion after he retired by talking with younger former co-workers. However, Complainant has not identified the particulars of this communication with former coworkers or when it occurred. Complainant states that it was only after extensive consultation with experts and other LE Staff and retirees that he formed a reasonable suspicion of age discrimination.

However, according to the EEO counselor's report, during counseling Complainant said that when he was hired on February 24, 1997, he signed for a LE Staff Handbook indicating he was ineligible for the Mission Germany Retirement Benefit Plan because he was over age 45, and on October 17, 2005, upon becoming a "FSN/LE" at Mission Germany he was advised he was ineligible for the DBP retirement plan. On appeal, Complainant denies the EEO counselor accurately reported what he told her in this regard and now asserts that during his employment he was never given or signed for a copy of the Local Compensation Plan or the LE Handbook.

In reply to Complainant's appeal, the Agency submits two job offers he accepted via signature on February 2, 1997, and February 15, 2007, that set forth his salary and benefits. It argues this shows Complainant knew or should have known from the beginning of his employment that retirement benefits were not part of his employment benefit package. We note that the job offers did not indicate Mission Germany had a pension or retirement plan, or that Complainant was excluded because he was past his 45th birthday when hired. However, the second offer letter reads "all other provisions governing" his employment were in the LE Staff Handbook for Germany which it indicated was on the human resources website.

A record copy of this handbook, at pages 90 – 92, discusses Mission Germany’s retirement plan, including the age restriction at issue.

Complainant’s contention on appeal that it was only after extensive consultation with experts and similarly situated LE Staff and retirees that he formed a reasonable suspicion of age discrimination suggests he was searching for information to support an earlier suspicion of discrimination. In his EEO complaint, Complainant recounts that in 2014, and again in 2015, Germany’s highest labor court ruled retirement benefit plans with an age of entry requirement violated German age discrimination law, were invalid, and former employees who were excluded based on age entry exclusion were entitled to retroactive benefits. Complainant recounted in his complaint that starting in November 2019, an LE Staff pension advocacy group had meetings with Mission Germany seeking retroactive inclusion into the pension program. It appears this group filed some sort of administrative grievance with the Agency over the matter, which was denied in the February 26, 2020 cable. While Complainant wrote in his EEO complaint that the February 26, 2020 cable denial did not reference the age restriction – it seems he knew the context.

In sum, we find that it is more likely than not that Complainant had a reasonable suspicion of age discrimination by the time he retired on October 31, 2017, long before he first sought EEO counseling.

Timeliness – Knowledge of the 45-day time limit and Laches

In response to the Agency’s finding that he knew or had constructive notice of the 45-day time limit because of posted notices on the EEO process on the Agency’s intranet and internet sites,² Complainant argues that he was not notified of the 45-day time limit or was otherwise aware of it. He argues that it is unreasonable to expect a locally hired staff member to proactively research the requirements for pursuing an EEO complaint on the State Department’s Washington internet site. We disagree. He also contends that as a member of the US Foreign and Commercial Service he did not have access the State Department’s intranet portals or email system, the time limit was not posted at his worksites in Dusseldorf and Munich, and he received no briefings on it.

Regardless Complainant’s actual or constructive notice of the 45-day limitation period, the Commission has consistently held that a complainant must act with due diligence in the pursuit of his claim or the doctrine of laches may apply. See Becker v. United States Postal Serv., EEOC Appeal No. 01A45028 (Nov. 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 Serv., EEOC Request No. 05901130 (Dec. 27, 1990).

² Screen shots of the referenced websites in the complaint file document that at least by September 15, 2020, posted notices of the 45-day time limit were on the Agency’s internet and intranet sites dedicated to employment information.

The doctrine of laches is an equitable remedy under which an individual's failure to pursue diligently his course of action could bar his claim. We find laches applies here. Complainant delayed almost three years after he retired to initiate EEO counseling. While the record may not show exactly when Complainant was notified of the time limit to initiate EEO counseling, we conclude that the record sufficiently supports a finding that he did not act with due diligence in starting his EEO case, justifying the application of the doctrine of laches.

Accordingly, the FAD dismissing the complaint for untimely EEO counseling is AFFIRMED.³

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>.

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.

³ Because we find Complainant failed to timely initiate EEO counseling, we need not address the Agency's dismissal for failure to state a claim.

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).

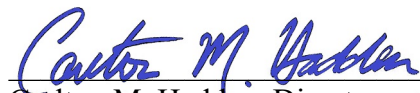
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

April 26, 2021
Date