



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

[REDACTED]
Amber W.,¹
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 2021002641

Hearing No. 570-2020-00949X

Agency No. HHS-OS-0040-2019

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 3, 2021, dismissing her complaint alleging 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Criminal Investigator, GS-14, at the Agency's Special Investigations Branch in Washington, D.C.

On August 27, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of sex (female), age, and reprisal for prior protected EEO activity when:

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. In the middle of July 2016, Complainant learned that the Agency had not selected her for an interview for a Supervisory Criminal Investigator position, Vacancy Announcement HHS-OIG-MP-1735322.
2. During a November 30, 2017 staff meeting, Special Agent in Charge (SAC) stated that Complainant had applied four times before she was promoted to a GS-14.
3. On September 28, 2018, SAC asked Complainant when she was eligible to retire in the presence of other Agency employees.
4. On March 6, 2019, Complainant learned that the Agency had not selected her for a Supervisory Criminal Investigator position, Vacancy Announcement HHS-OIG-OI-MP-10409212-TR.²
5. In April 2019, Complainant learned that the Agency had not selected her for an interview for a Supervisory Criminal Investigator position, Vacancy Announcement HHS-OIG-OI-MP-10441666-MW (Supervisory Criminal Investigator Position #1666).

After the Agency completed its EEO investigation into the complaint, Complainant requested a hearing before an EEOC Administrative Judge (AJ). On December 16, 2020, the Agency filed a motion to dismiss the complaint for failure to comply with the time limit contained in 29 C.F.R. § 1614.105(a)(1). On December 16, 2020, the AJ issued a decision dismissing the complaint, pursuant to 29 C.F.R. § 1614.105(a)(1), for untimely EEO counselor contact.

In doing so, the AJ found that Complainant had two disparate treatment claims based on non-selection for the Supervisory Criminal Investigator position, and a hostile work environment claim. The AJ found that Complainant learned that she had not been selected for the Supervisory Criminal Investigator position in July 2016 and on April 1, 2019, but she did not initiate contact with an EEO counselor regarding her non-selection until May 30, 2019, making her EEO contact for the non-selections 33 months late and two weeks late respectively. In addition, the AJ found last incident of alleged harassment supporting Complainant's hostile work environment claim was April 1, 2019, which was also beyond the 45-day limitation period.

On March 3, 2021 the Agency issued a final order adopting the AJ's dismissal of the complaint because Complainant failed to initiate contact with an EEO counselor within 45 days of her disparate treatment claims and hostile work environment claim.

The instant appeal followed.

² On August 30, 2019 the Agency dismissed this claim pursuant to 29 C.F.R. § 1614.105(a)(1). Complainant did not appeal the dismissal. Therefore, the claim has not been considered on appeal.

ANALYSIS AND FINDINGS

The matter before us is whether Complainant's entire complaint was properly dismissed for untimely EEO counselor contact. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the EEO 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.

It is undisputed that Complainant's initial contact with an EEO counselor was on May 30, 2019. This was clearly well beyond the 45-day limitation period from the July 2016 and March 2019 non-selections, as well as the latest alleged incident supporting Complainant's harassment/hostile work environment claim.

EEOC regulations provide that the Agency or the Commission shall extend the time limits when a complainant shows 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 he was prevented by circumstances beyond her control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the Agency or the Commission. Here, Complainant does not claim that she was unaware of the 45-day rule. She also does not allege that any circumstances beyond her control prevented her from making timely counselor contact. As such, Complainant has not made an argument for waiver, estoppel, or equitable tolling of the timeline for making initial EEO counselor contact.

However, the AJ based the dismissal of Complainant's April 2019 non-selection (claim 5) on a determination that the 45-day limitation period was triggered on April 1, 2019. However, we find this conclusion was in error. According to an affidavit from Complainant, April 1, 2019, was the date she heard a rumor from a coworker that some applicants for the position had been given interviews although she had not been contacted for an interview. However, the record affirmatively establishes that Complainant was not officially notified of her non-selection until April 15, 2019, when she received an email notice on that date from human resources. That notification, dated April 15, 2019, is contained in the Report of Investigation, at page 839, which was before the AJ at the time of the dismissal decision. Complainant's May 30 contact was within 45 days of the April 15 notice of her non-selection.

On appeal, Complainant also asserts for the first time that she did not suspect discrimination³ until an April 22, 2019 general email to her work group that announced the name of the selectee. The Agency argues that we should not consider this email because, despite its apparent availability, Complainant did not raise it before the AJ when the dismissal was being considered.

³ The Commission has adopted a "reasonable suspicion" to determine when the forty-five (45) day limitation period is triggered. See Howard v. Department of the Navy, EEOC Request No. 05970852 (February 11, 1999).

We, however, do not need to consider this evidence because Complainant's May 30 EEO counselor contact was timely made from the date she received the official Agency notice of her non-selection. Accordingly, we conclude the AJ erred in dismissing Complainant's April 2019 non-selection claim as untimely raised.

CONCLUSION

The Agency's decision to adopt the AJ's dismissal of the complaint is hereby **AFFIRMED** in part and **REVERSED** in part. The claim concerning the April 2019 non-selection (claim 5) is **REMANDED** to the Agency for further processing in accordance with the following Order.

ORDER (E1016)

The Agency is ordered to process the remanded claim (claim 5 concerning the April 2019 non-selection) 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.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

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>

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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

July 28, 2021

Date