



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

[REDACTED]
Willa B.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Appeal No. 2020003720

Hearing No. 450-2018-00337X

Agency No. HS-FEMA-00282-2018

DECISION

On October 19, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated October 25, 2019,² dismissing her equal employment opportunity (EEO) 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final order and REMANDS the complaint for further action.

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.

² While we note that Complainant's October 19, 2019, appeal was premature, the Commission finds that the appeal is now ripe for adjudication as the Agency subsequently issued a final decision on October 25, 2019.

ISSUE

The issue is whether the Administrative Judge properly dismissed Complainant's complaint for untimely contact with an EEO counselor.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Emergency Management Response/Recovery Program Specialist at the Agency's Individual Assistance Division in Denton, Texas.

On September 15, 2017, the Agency issued Complainant a Notice of Termination of Appointment for 520 hours of absence without leave (AWOL). The Agency noted that, due to the nature of Complainant's position, she did not have appeal rights to the Merit Systems Protection Board. However, the Agency extended Complainant an opportunity to appeal her termination with the Section Chief (SC) of the Program Management Section, who would issue a "final and binding decision." The Agency also informed Complainant that if she alleged that the action was discriminatory, she could file an EEO complaint and must contact the EEO office within 45 days of the effective date of the decision. Report of Investigation (ROI) at 69-71.

On September 18, 2017, the Agency re-issued the termination notice because the first notice omitted the effective date of Complainant's removal. The Agency informed Complainant that her termination was effective on September 18, 2017. ROI at 254-56. Again, the notice provided Complainant the opportunity to appeal the matter to the SC who would issue a "final and binding decision." Id. Complainant stated that she appealed her removal with SC. ROI at 58.

While her appeal of the removal with SC was pending, on November 8, 2017, Complainant contacted the EEO Counselor alleging discrimination. ROI at 16. On December 11, 2017, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (African American) and disability (mental and physical) when, on September 18, 2017, Complainant received a Notice of Termination of Appointment from her Cadre-on-Call Reservist Employee position as a Program Specialist, Individual Assistance Division, Performance Management Section when she was charged with AWOL.

The Agency accepted the complaint for investigation. On December 12, 2017, the SC issued a decision denying Complainant's appeal of the termination action. At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On August 25, 2019, the Agency filed a Motion to Dismiss for untimely contact with an EEO counselor. The Agency stated that management terminated Complainant's employment on September 15, 2017, but due to a typographical error, it omitted the effective date of Complainant's termination.

On September 18, 2017, the Agency re-issued the termination notice, with an effective date of September 18, 2017. The Agency stated that Complainant received both notices on September 18, 2017, and that she did not contact an EEO Counselor until November 8, 2017.

Through her representative, Complainant opposed the Agency's motion and stated that she was confused by the two termination notices, which gave her different avenues to appeal her removal. However, Complainant noted that both termination letters informed her that SC would make the "final and binding decision." Complainant stated that she contacted the EEO office on November 8, 2017, and that SC issued her decision on December 12, 2017. Complainant also stated that she was suffering from "severe emotional depression and psychological disorders."

On September 16, 2019, the AJ granted the Agency's motion. The AJ found that it was undisputed that Complainant learned of her termination on September 18, 2017, and that the termination notice made Complainant aware of her 45-day deadline to initiate her EEO complaint. The AJ determined that Complainant waited 51 days and contacted the EEO office on November 8, 2017. While Complainant stated that she was suffering from "emotional issues," the AJ found that Complainant did not present specific evidence that her medical condition prevented her from timely contacting an EEO Counselor.

The Agency issued a final order adopting the AJ's decision. Complainant filed the instant appeal and submitted a statement and additional evidence in support of her appeal. The Agency did not respond to Complainant's appeal.

CONTENTIONS ON APPEAL

For the first time on appeal, Complainant states that she called the EEO office on October 1, 2017, and she was informed that someone would call her back. Complainant states that she called again and was given other telephone numbers to call. When she left messages, Complainant claims that no one returned her calls. Complainant asserts that she timely called the EEO office but was given the run-around. With her appeal, Complainant provided her telephone call logs showing that she made outgoing calls to the EEO office.

Complainant also states that she was under the care of a physician and seeing a therapist twice a month at the time of her removal. Complainant requests that the Commission reverse the Agency's decision.

ANALYSIS AND FINDINGS

EEOC regulation 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. 29 C.F.R. § 1614.105(a)(1).

An agency shall dismiss a complaint which fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.105, unless the agency extends the time limits in accordance with § 1614.604(c), which provides that the filing limitation period is subject to waiver, estoppel, and equitable tolling. 29 C.F.R. § 1614.107(a)(2). However, the Commission has previously held that an agency may not dismiss a complaint based on a complainant's untimeliness, if that untimeliness is caused by the Agency's action in misleading or misinforming the complainant. See Wilkinson v. U.S. Postal Serv., EEOC Request No. 05950205 (Mar. 25, 1996). See also Elijah v. Dep't of the Army, EEOC Request No. 05950632 (Mar. 28, 1996) (if agency officials misled complainant into waiting to initiate EEO counseling, agency must extend time limit for contacting EEO Counselor).

Based on our review of the record, we find that the Agency's notice misled Complainant when it informed her that she could appeal her removal to SC, who would then issue a "final and binding decision," which reasonably caused Complainant to believe that the removal action would not be final until SC's determination. ROI at 69-71. In addition, when SC issued her decision, she included the contact information for the EEO Office, if Complainant wished to file an EEO complaint. We further find that the Agency misled Complainant when it accepted her complaint as timely and noted that the "final decision" on Complainant's appeal of her removal had not been issued, as of November 28, 2017. ROI at 43.

We find that the Agency's actions provided tolling of the filing limitation period as Complainant was under the impression that her removal would not be "final and binding" until SC's December 12, 2017 decision. As such, we REVERSE the Agency's final order and REMAND the matter for further action, in accordance with the Order below.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, and arguments and evidence not specifically discussed in this decision, the Commission REVERSES the Agency's final action and REMANDS the matter to the Agency in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Dallas District Office Hearings Unit within thirty (30) calendar days of the date this decision becomes final. The Agency Hearings 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 hold a hearing and issue a decision on the complaint 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 (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 (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

September 2, 2021

Date