



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

[REDACTED]
Julie L.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2021003249

Agency No. 2004-0558-2021101562

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated April 15, 2021, dismissing a formal 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

Complainant is a former employee who had worked as an Advanced Medical Support Assistant, Grade GS-6, at the Agency's Medical Center in Durham, North Carolina.

On December 11, 2020, the Agency denied Complainant's request to amend a prior EEO formal complaint (identified as Agency No. 2004-0558-2020100463), as the Commission had already rendered a decision on that case. Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 2020003471 (Aug. 17, 2020).

The Agency's amendment denial decision advised Complainant as follows:

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.

. . . you should seek EEO counseling on the claims contained in your request to amend, should you wish to do so. The date of the initial contact for the new complaint will be September 11, 2020, the date of the amendment request.

The parties did not informally resolve claims contained in the request to amend, which was re-designated under the captioned Agency number, Agency Case No. 2004-0558-2021101562. On March 31, 2021, Complainant filed a formal complaint alleging she was subjected to unlawful retaliation when:

- a. From 2008 to 2017, the Agency failed to reinstate Complainant based on her prior career service;
- b. On November 8, 2018, Complainant was not selected for the position of Advanced Medical Support Assistant, under vacancy announcement numbers CBBN-10220191-18-KLN and CBBN-10220192-18-KLN;
- c. On November 8, 2018, Complainant was not selected for the position of Medical Support Assistant, under vacancy announcement number CAYZ-10233326-18-TT;
- d. On November 5, 2019, Complainant was not selected for the position of Advanced Medical Support Assistant (PACT) under vacancy announcement number CBBN-10493205-19-MSB;
- e. On September 14, 2020, a former Human Resource Specialist, convinced Complainant to withdraw a complaint; and
- f. On September 28, 2020, Complainant was not selected for the position of Medical Support Assistant under Vacancy Announcement number 10855529-20FLM.

The Agency dismissed Complainant's claims for untimely EEO Counselor contact. Specifically, the Agency decided that Complainant had acquired reasonable suspicion of discrimination no later than September 28, 2020, but did not contact an EEO Counselor until December 11, 2020, which was 76 days later.

On appeal, Complainant raises numerous assertions that her initial EEO Counselor contact was timely.

ANALYSIS AND FINDINGS

Claims (a), (b), (c) and (d)

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint that fails to comply with the applicable time limits. 29 C.F.R. § 1614.105(a)(1) requires that Complainant initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or within 45 days of the effective date of the personnel action. Pursuant to 29 C.F.R. § 1614.105(a)(2), the Agency or the Commission shall extend the 45-day time limit if Complainant shows that she was not notified or otherwise aware of the time limits, that she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence she was prevented by circumstances beyond her control from contacting the EEO counselor within the time limit, or for other reasons considered sufficient by the agency or the Commission.

Claim (a) addresses a practice of Agency purported failure to reinstate, over a span of nine years, ending in 2017. The non-selections in Claim (b) and Claim (c) purportedly occurred on November 8, 2020. Claim (d) addressed a purported November 5, 2019 non-selection. We further find that each of these claims reflect separate, discrete Agency acts of alleged discrimination that are distinguishable from one another. Those first four claims were well-beyond the applicable 45-day time limit in September 2020, when Complainant requested to amend her prior complaint, Agency No. 2004-0558-2020100463. The record reflects that Complainant was aware of the regulatory time limit and failed to persuade us of circumstances warranting an extension. We concur with the Agency dismissal of claims (a) – (d) for the reason discussed above.

Claim (e)

Pursuant to EEOC regulation 29 C.F.R. § 1614.107(a)(8), an agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint. We construe Claim (e) as Complainant expressing dissatisfaction with information or advice that the Agency provided her on pursuit of a previously withdrawn EEO complaint. In sum, we conclude that Claim (e) was properly dismissed, albeit as a spin-off complaint which is not justiciable in the instant appeal.

Claim (f)

An agency must present sufficient evidence to support dismissal for untimely EEO contact. Guy v. Dep't of Energy, EEOC Request No. 05930703 (Jan. 4, 1994). The Agency did not do so with respect to Claim (f) which related to a purported September 28, 2020 non-selection. In September 2020, Complainant requested to amend a prior complaint (Agency No. 2004-0558-2020100463) by adding the claims at issue. The Agency denied her request but acknowledged

the attempted amendment's allegations as Agency No. 2004-0558-2021101562. The denial decision stated that *September 11, 2020*, was the effective date of EEO Counselor contact for this complaint, now known as Agency No. 2004-0558-2021101562. The non-selection event of Claim f. purportedly occurred on September 28, 2020, within the time limit of 45 calendar days of September 11, 2020, which was the contact date that the Agency had established in its amendment denial decision.

We note that the EEO Counselor reported that Complainant had communicated by telephone on December 11, 2020. Nevertheless, in its final decision and its appellate response, the Agency declined to explain the discrepancy between the September 2020 and December 2020 EEO contact dates. The record was inconsistent in terms of verifying Complainant's date of EEO Counselor contact. We therefore will rely upon the earlier contact date which the Agency identified: September 11, 2020. Thus, Claim f. was timely raised with an EEO Counselor, for purposes of 29 C.F.R. § 1614.107(a)(1) and dismissal of Claim f alone was improper.

CONCLUSION

Accordingly, we AFFIRM the Agency's dismissal of matters Claims (a) – (e) for the reasons set forth herein.

However, we REVERSE, the Agency's final decision concerning Claim (f). Claim (f) is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claim (claim f) in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to Complainant that it has received the remanded claim **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 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 notice that transmits the investigative file and notice of rights, and 3) a copy of Complainant's request for a hearing, a copy of Complainant's request for a final Agency decision, or a statement that Complainant did not respond within 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 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 required digital format, referencing the 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. 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 Complainant and her representative.

If the Agency does not comply with the Commission's order, Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). 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. 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, 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 Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. 29 C.F.R. § 1614.405; EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington DC 20013, or by certified mail to 131 M Street, NE, Washington DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. 29 C.F.R. § 1614.604. The Agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. 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

October 6, 2021

Date