



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

[REDACTED]

Lenard H,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2021004165

Agency No. ARCEHONO21NOV00024

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 27, 2021, dismissing his 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.

BACKGROUND

During the period at issue, Complainant worked as a Supervisory Civil Engineer, Grade GS-13, Chief, Technical Integration Branch, within the Engineering and Construction Division at the Agency's Honolulu District in Hawaii.

On November 27, 2020, Complainant initiated EEO Counselor contact. On December 9, 2020, the parties executed an agreement to extend counseling which established November 27, 2020, as the date marking Complainant's EEO Counselor contact regarding various matters relating to harassment and being denied advancement by Agency management. The extension agreement further stated that EEO counseling would be completed no later than February 25, 2021.

On February 25, 2021, Complainant emailed his written narrative to the EEO Counselor which contained additional information that addressed prior allegations of non-selection and

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.

harassment. Complainant attached various documents to that email. For example, Complainant attached organizational charts and a list of his performance ratings. Another attachment was a memorandum for record showing that the Agency had informally investigated Complainant's allegation that the Chief, Engineering and Construction Division (Division Chief) had told inappropriate jokes during a 2008 staff meeting. The investigating official noted that Complainant could not recall specific details of what the Division Chief had said and nothing was found that corroborated Complainant's allegation. As a result the memorandum concluded that Complainant's harassment allegation did not warrant further investigation. Complainant also attached emails and texts that were dated between March 2020 and May 2020. Apparently, Complainant became upset because the Division Chief had erroneously called and texted Complainant at a cell phone number that was now used by Complainant's daughter.

On March 9, 2021, Complainant filed a formal complaint alleging that he had been subjected to discrimination on the basis of race/national origin (Hispanic). In the instant final decision, the Agency articulated Complainant's complaint as follows:

On April 23, 2019, Complainant became he was aware that he was not selected for a GS-14, Chief Environmental Programs vacancy.

In the instant final decision, the Agency dismissed Complainant's claim for untimely EEO Counselor contact. Specifically, the Agency determined that the non-selection at issue had occurred on April 23, 2019 but that Complainant had not contacted an EEO Counselor until November 27, 2020.

The instant appeal followed. On appeal, Complainant restated anti-Hispanic harassment accusations against the Division Chief. Complainant listed four more times the Agency non-selected him for GS-14 positions that had occurred on June 2018, April 2019, September 2019 and May 2020. Complainant also stated management had wrongfully failed to announce a GS-14 vacancy under the Chief of Information Officer for (CIO) the Agency's Pacific Ocean region.

In response to Complainant's appeal, the Agency presented a copy of the announcement text from the CIO vacancy announcement (SWHB204466893412) that it had posted on the USAJOBS website. Vacancy announcement SWHB204466893412 was open on May 22, 2020 and it closed on May 27, 2020. According to the Agency, Complainant had not applied and his EEO Counselor contact on November 27, 2020, was untimely for his claim regarding CIO vacancy. Likewise, the Agency contended that it had properly dismissed as untimely, all of the claims that Complainant had raised during informal EEO counseling, within his formal complaint and on appeal.

ANALYSIS AND FINDINGS

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 calendar days of the date of the matter alleged to be discriminatory or within 45 calendar 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 he was not notified or otherwise aware of the time limits, that he did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he 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.

This Commission has carefully reviewed the entire, somewhat confusing record. We first acknowledge that the Agency identified a singular non-selection claim in April 2019, as the essence of the formal complaint. However, we cannot conclude that Complainant has articulated an ongoing pattern of abusive language or abusive conduct. Instead, Complainant has described various discrete acts.

Here, Complainant has raised various claims that were distinct from one another, about certain events that occurred over twelve years. Complainant has stated that upon assuming his position in 2007, the Division Chief had spoken in an offensive manner which was otherwise unspecified. Complainant stated that the Division Chief had ceased doing so either because of Complainant's reactions or after Complainant reported the issue. Thereafter, from June 2018 to May 2020, management purportedly did not select Complainant, at least four times, to three different GS-14 promotion opportunities that were either within or near the Agency's Honolulu District. Then sporadically over separate weeks in early 2020, the Division Chief had mistakenly attempted to contact Complainant using an incorrect number that Complainant had previously provided as his own. The Division Chief apologizing to Complainant for the confusion, and that he would delete the number that Complainant's daughter now used. The most recent discrete act we considered Complainant having claimed as discrimination took place when the CIO's GS-14 vacancy announcement, SWHB204466893412, closed before Complainant was aware that he could apply. The Agency has proved that event happened no later than May 27, 2020. Therefore, we concur with the Agency, in that Complainant's EEO Counselor contact, approximately five months later, on November 27, 2020, was untimely for purposes of 29 C.F.R. §§ 1614.105(a)(1) and 1614.107(a). Finally, Complainant has not put forth evidence or argument that is sufficient to persuade us of circumstances that would justify extending the applicable time limit.

CONCLUSION

Accordingly, the Agency's final decision is AFFIRMED because the Agency properly dismissed Complainant's complaint for untimely EEO Counselor contact.

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 (S0610)

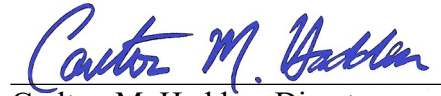
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

October 18, 2021
Date