



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Alene S.,¹
Complainant,

v.

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

Appeal No. 2021004389

Agency No. 200H-0539-2021101885

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision², dated June 30, 2021, dismissing her 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse Care Manager, Grade III, at the Agency's Cincinnati Veterans Affairs (VA) Medical Center in Cincinnati, Ohio. On July 16, 2020, she received a removal notice, effective August 9, 2020. Immediately afterwards, on August 11, 2020, she filed an administrative grievance.

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 A Final Agency Decision (FAD) was issued and received by Complainant on June 24, 2020. The record reflects that a revised FAD, correcting typographical errors, was issued on June 30, 2020 and received by Complainant's counsel that same day.

Complainant contacted an EEO counselor on January 19, 2021. On April 27, 2021, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Caucasian) and in reprisal for prior protected EEO activity when:

on August 4, 2020, she received a notice of removal terminating her from her position, effective August 9, 2020.

On June 30, 2021, the Agency issued a decision dismissing the complaint for untimely EEO Counselor contact pursuant to 29 C.F.R. §1614.107(a)(2). The Agency reasoned that Complainant's January 19, 2021 contact was more than forty-five days after her August 4, 2020 removal.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the August 4, 2020 notice of removal set forth processes for appeal. She argues that the removal letter specifically referenced grievances, the Office of Special Counsel, and the EEO process, and therefore it was her understanding that raising her issues under the negotiated grievance procedure was a "precursory step to an EEO claim." Further, she asserts that her grievance claim was timely filed and that it is illogical for the Agency to require a grievance procedure prior to filing an EEO claim if it is not going to toll the 45-day time limit for an EEO claim.

In response, the Agency reiterates that Complainant's EEO contact was untimely. It maintains that Complainant was aware of the forty-five-day time limit for contacting an EEO Counselor, as she had previously used the EEO process. The Agency notes that filing of a grievance does not toll the 45-day time limit for contacting an EEO Counselor, and that Complainant has not offered a reason to depart from precedent in her case. Lastly, the Agency urges that Complainant's appeal should be denied and the dismissal of her complaint affirmed.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity 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. 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. See Howard v. Department of the Navy, EEOC Request No. 05970852 (February 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.

EEOC regulations provide that the Agency or the Commission shall extend the time limits when the individual shows that he was not notified of the time limits and was not otherwise aware of them, that he 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 his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. Ellis v. United States Postal Service, EEOC Request No. 01992093 (Nov. 29, 2000).

In the instant case, the parties do not dispute that Complainant received her notice of removal on August 4, 2020. Complainant, however, waited until January 19, 2021 to contact an EEO Counselor, well beyond the forty-five day time limit. Complainant, who is represented by counsel, argues that she mistakenly believed she was required to utilize the negotiated grievance process before filing an EEO complaint. Further, she contends that the filing of her grievance should toll the time limit for contacting an EEO Counselor. A review of the removal notice reflects that Complainant was informed of her right to file an EEO complaint if she believed the action was discriminatory, and that her “initial contact with the ORM [Office of Resolution Management] must be done within 45 days of the effective date of this action.” Moreover, the Commission has consistently held that utilization of internal agency procedures, union grievances, and other remedial processes does not toll the time limit for contacting an EEO Counselor. See Quigley v. Dep’t of Veterans Affairs, EEOC Appeal No. 012013647 (June 28, 2013); Kramer v. United States Postal Service, EEOC Appeal No. 01954021 (October 5, 1995); Ellis v. United States Postal Service, EEOC Request No. 01992093 (Nov. 29, 2000). Therefore, we find that Complainant failed to provide sufficient justification for extending or tolling the time limit for contacting an EEO Counselor.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED.

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 19, 2021

Date