



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Scarlet S.,¹
Complainant,

v.

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

Appeal No. 2021003985

Agency No. ARLEWIS21JAN00539

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 19, 2021, dismissing her complaint alleging unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Contracting Specialist, NH-1102-02, at the Agency's Joint Base Lewis-McChord Health Contracting Branch (JBLM-HCB) in Joint Base Lewis-McChord, Washington.

On January 29, 2021, Complainant contacted an EEO counselor via email, stating she wished to pursue the EEO process. Complainant had a conversation with the EEO Case Manager on February 3, 2021, and the Case Manager sent Complainant a follow-up email with a copy of her Rights and Responsibilities and instructions for Complainant to supply details of her informal complaint. On February 12, 2021, having not received the details, the Case Manager emailed Complainant asking for her intent regarding the complaint process. Complainant responded that same day stating she was sick, but she would assemble her case. Complainant then contacted the EEO Director on February 26, 2021, stating she would submit her information by March 1, 2021.

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.

On March 1, 2021, the EEO office did not receive any information from Complainant, so the Case Manager issued Complainant her Notice of Right to File.

On March 2, 2021, Complainant filed a formal complaint, She declined to complete Agency form DA Form 2590, but sent a lengthy memorandum alleging that the Agency subjected her to discrimination and harassment on the bases of disability and reprisal for prior protected EEO activity. (Complaint File, pp. 50-53, 234-245). The Agency acknowledged receipt of the email submission of Complainant's formal EEO complaint on March 2, 2021. (Complaint File, p. 113).

However, the Agency did not think the information provided clarified or assisted the EEO office in framing Complainant's claim(s), and, on March 8, 2021, the EEO Case Manager emailed Complainant requesting clarification and assistance with completing the DA Form 2590 (Complaint File, p. 27). Complainant then sent a 12-page memorandum which the Agency appears to have stamped received on March 15, 2021. (Complaint File, pp. 53-64).

On March 18, 2021, the Agency again sought clarification from Complainant, issuing a letter stating that "[a]fter a review of submitted formal complaint and speaking with you, you have alleged harassment and discrimination based on Reprisal and Physical and Mental disability. It's important you state the incident(s) that caused you to initiate your complaint as concisely as possible, provide the date and by whom. This information is necessary to determine whether your complaint is appropriate for processing under Title 29, Code of Federal Regulations, Part 1614. If this information has not been provide[sic] within 15 calendars days from receipt of this notice, your complaint may be dismissed under 29 CFR 1614.107(a)(7)." (Complaint File, p. 23). It is not clear from the record how this letter was transmitted to Complainant or whether it was received by Complainant.

On April 2, 2021, Complainant had a phone conversation with the EEO Director in which Complainant was given until midnight that day to submit her clarification. However, the EEO Director agreed that as long as the clarification was received by her and the Case Manager in their email inbox by the time they arrived at work at 7:00 am on Monday, April 5, 2021, Complainant would have met her time limit. On April 5, 2021, Complainant submitted a 14-page clarification at 2:10 pm, after the agreed upon deadline. (Complaint File, pp. 35-48).

The Agency dismissed Complainant's formal complaint, pursuant to 29 C.F.R. 1614.107(a)(7), for failure to respond and proceed in a timely manner, stating that the complaint lacked specificity necessary to frame allegations, Complainant did not address the Agency's request to provide relevant information, and her response was filed untimely. Complainant filed the instant appeal.

On appeal, Complainant contends the entire complaint submitted on January 21, 2021, contains the facts illustrating the discriminatory acts which led to her filing a complaint. Complainant further stated that, "[t]here were unusual circumstances leading to the unintentional delay of filing my EEO Appeal with both my local agency; JBLM, WA EO Office and the EEOC.

I understood to be within my filing timeline based on being incapacitated for a long period of time due to declining health conditions.” (Complainant Extension Request). In support of this, Complainant provided a doctor’s note from her an orthopedic surgeon which indicated Complainant had undergone a surgical procedure on March 5, 2021, and remained partially incapacitated and in a state of post-operative surgical recovery from the date of surgery through September 13, 2021. (Complainant Doctor Letter).

The Agency contends on appeal that Complainant did not timely file her appeal. In support of this, the Agency states that Complainant received the Agency’s final decision via DOD Safe on May 21, 2021, and per the standard timeframe, Complainant had seven days to access the file before it expired. However, Complainant did not open the decision during this time frame. The file expired and the EEO Office had to re-submit the decision letter and supporting documentation. Complainant then opened the decision on June 4, 2021 (Complaint File, p. 127). The Agency also contends on appeal that Complainant purposefully used delay tactics, failed to respond or proceed in a timely manner, and did not provide documentation sufficient for adjudication of her claims.

ANALYSIS AND FINDINGS

Timeliness

Appeals to the Commission must be filed within 30 days of receipt of the Agency’s dismissal, final action or decision. 29 C.F.R. § 1604.402(a). If an appellant does not file an appeal within the time limits of this subpart, the appeal shall be dismissed by the Commission as untimely. 29 C.F.R. § 1604.403(c).

Where, as here, there is an issue of timeliness, “[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness.” Guy v. Dep’t of Energy, EEOC Request No. 05930703 (January 4, 1994) (quoting Williams v. Dep’t of Defense, EEOC Request No. 05920506 (August 25, 1992)). In addition, in Ericson v. Dep’t of the Army, EEOC Request No. 05920623 (January 14, 1993)), the Commission stated, “the agency has the burden of proving evidence and/or proof to support its final decisions.” See also Gens v. Dep’t of Defense, EEOC Request No. 05910837 (January 31, 1992). The Agency has failed to meet its burden in this case.

In its appeal brief, the Agency states both that Complainant received her decision on May 20, 2021 (Agency Opposition, pp. 1-2), and that she received her decision on May 21, 2021 (Agency Opposition, pp. 5, 7). The Agency contends Complainant received her decision from the Agency on May 21, 2021, as that is the date it was made available to her in DOD Safe. In support of this, the Agency cites to the Investigative File at page 105. However, this is the Agency’s March 8, 2021 Request for Clarification, not the Agency’s decision. The Investigative File provided by the Agency does contain a document showing a file drop off was completed for a file that was sent successfully to Complainant. However, the filename is illegible and the comments state, “[a]ttached you will find information concerning the formal complaint.”

Therefore, it is not clear what file was transmitted to Complainant and whether it was in fact the Agency's final decision. Additionally, there is no date and time stamp to show when the file was dropped off. The print out is stamped "5/21/2021" and handwritten on the document is "May 21, 2021", but the document itself does not contain a date and time (or if it does, it is not legible). (Complaint File, p. 116).

In contrast, the Investigative File contains an automated email dated June 4, 2021 at 12:43 pm that states, "[t]he file 'Decision with supporting documents.pdf' was picked up by 'HART.JUDITH.ROSE' using the code sent to 'judith.r.hart.civ@mail.mil'" and indicates that date of drop off of the file was June 4, 2021 at 5:41:34 UTC. (Complaint File, p. 127).

We also note that the Agency's decision does not contain a certificate of service to show when the decision was transmitted to Complainant. Based on the foregoing, we find the Agency has not met its burden to demonstrate Complainant received the decision prior to June 4, 2021. Complainant submitted her appeal on July 6, 2021. Thus, we find Complainant timely filed her appeal.²

Failure to Cooperate/Failure to Provide Clarification of the Complaint

EEOC Regulation 29 C.F.R. § 1614.107(a)(7) states that if a complainant failed to respond to a request within 15 days of its receipt or if a complainant's response does not address the agency's request and if the agency included a notice of proposed dismissal for failure to respond, then the agency may dismiss the complaint. However, 29 C.F.R. § 1614.107(a)(7) also provides that if sufficient information is already available, then the complaint may be adjudicated. Where the Agency dismisses a complaint in for failure to cooperate pursuant to 29 C.F.R. § 1614.107(a)(7) the agency bears the burden to support its dismissal decision. Posey v. Dep't of Health and Human Servs., EEOC Appeal No. 01982207 (Aug. 8, 2000).

The Commission has consistently held that an agency should not dismiss a complaint when it has sufficient information upon which to base an adjudication. Ross v. U.S. Postal Serv., EEOC Request No. 05900693 (Aug. 17, 1990); Brinson v. U.S. Postal Serv., EEOC Request No. 05900193 (Apr. 12, 1990). To support a dismissal for failure to cooperate, an Agency must show that a complainant purposely engaged in delay or contumacious conduct and that there is insufficient information in the record to permit continuing the adjudication. Martinez v. U.S. Postal Serv., EEOC Appeal No. 0120113028 (Nov. 2, 2011); see also Card v. U.S. Postal Serv., EEOC Request No. 05970095 (Apr. 23, 1998); Kroeten v. U.S. Postal Serv., EEOC Request No. 05940451 (Dec. 22, 1994).

² 29 C.F.R. § 1614.604(d) indicates that the first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day. In this case, the deadline of July 4, 2021 fell on a Sunday. July 5, 2021 was a Federal holiday. Therefore, Complainant's appeal was docketed the next business day, on July 6, 2021.

Here, we find the Agency has failed to carry its evidentiary burden required to support dismissal for failure to cooperate. Complainant provided at least three statements regarding her belief that she has been subjected to discrimination and harassment as a result of her physical and mental disabilities, as well as reprisal for protected activity, all of which contain dates and names of individuals. While the Agency may have wished Complainant was more concise, it cannot say the information provided is, as a whole, too vague and generalized. The information provided on Complainant's claims was sufficient to identify management actions she is concerned with, the relevant timeframes and the responsible management officials. This is sufficient information to permit management witnesses to respond to complainant's allegations. See Hearl v. U.S. Postal Serv., EEOC Appeal No. 0120082505 (July 28, 2008). Whether or not these statements by Complainant provide sufficient evidence to support her claim of discrimination can be addressed in an adjudication of the merits of her complaint.

Therefore, we conclude that the Agency should have completed framing the complaint and adjudicating the complaint on the merits and that its dismissal for failure to respond or proceed in a timely manner under 29 C.F.R. § 1614.107(a)(7) was improper.

CONCLUSION

For the foregoing reasons, we **REVERSE** the Agency's final decision dismissing Complainant's complaint. We **REMAND** the complaint for further Agency processing in accordance with this decision and **ORDER** below.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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.

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 Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of 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 (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

December 21, 2021

Date