



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Melania U.,¹
Complainant,

v.

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

Appeal No. 2021004735

Agency No. ARASC21APR01229

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision, dated July 29, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 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 Logistics Management Specialist, GS-13, for the Agency's 401st Army Field Support Brigade in Camp Arifjan, Kuwait. Complainant initiated EEO Counselor contact on April 14, 2021 and was issued a Notice of Right to File a Formal Complaint of Discrimination (hereinafter "Notice") via email. On July 14, 2021, Complainant filed a complaint alleging that the Agency subjected her to discriminatory harassment on the bases of race (African-American), sex (female), age (48), and reprisal as evidenced by the following events:

- (a) On June 11, 2021, Complainant's superior (S1) informed her that she was terminated, and that she had one day to pack her belongings and make arrangements to leave Kuwait;

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.

- (b) On June 4, 2021, the clinical psychologist issued a "Medical Disqualification Condition" memorandum about Complainant;
- (c) On or about May 13 or 14, 2021, one of the commanding officers (CO1) asked Complainant to have sex with him and told her that because she had not had sex with him, he would "annoy" her and that "it's better to acquiesce;"
- (d) On or about May 5, 2021 and April 27, 2021, S1 followed Complainant and ordered other people to follow her as well;
- (e) On May 4, 2021, a coworker (C1) told Complainant that Complainant would not be there past May 1, 2021 and that her hand receipt would be given to C1;
- (f) On April 20, 2021, Complainant's physician informed her that S1 asked him about her medical condition and behavioral health status, and requested a fit-for-duty evaluation;
- (g) On April 17, 2021, one of Complainant's coworkers rudely and sternly gave Complainant orders in front of other coworkers and allowed the other coworkers to say despite Complainant asking them to leave;
- (h) On April 17, 2021, S1 called a meeting with Complainant and others to question her about fraudulent time and attendance on April 1, 2, 6, and 8, and during the meeting, a major yelled at Complainant when she asked S1 when he would be available after she looked at her calendar to determine her whereabouts on the above-mentioned dates;
- (i) On April 17, 2021, Complainant went to the emergency room due to stress and was given quarters;
- (j) On April 12, 2021, another superior officer (M1) allowed other officers to sit in on an open-door meeting and M1 denied her request to be moved out from S1's supervision;
- (k) On April 12, 2021 after the open-door meeting, Complainant went to the Mental Health Walk-In Clinic and was given 72 hours quarters;
- (l) On April 10, 2021, S1 humiliated Complainant in front of other colleagues during a KT4 meeting;
- (m) On or about the week of April 4-10, 2021, S1 told Complainant that she should be able to pick up 60, 70, or 80-pound equipment which is heavier than her male counterparts could pick up;

- (n) On April 2, 2021, Complainant became aware that people were entering her room and work area without permission;
- (o) In late March or early April 2021, the Agency sent a number of Complainant's coworkers to a GCSS Army training course but excluded Complainant;
- (p) In early November 2020, a coworker told Complainant that S1 had asked him and others about her and collected statements from soldiers concerning her Congressional complaint against the command;
- (q) On or about November 12, 2020, S1 informed Complainant that she could not speak to contractors and S1 and another co-worker told Complainant to transfer all equipment after she located the lost and unaccounted for equipment;²
- (r) On October 29, 2020, an officer told Complainant that he would move her from South West Asia following her resignation letter to him, but did not do so;
- (s) On October 13, 2020, that same officer told Complainant that a co-worker, who is a GS-12 and Complainant's sponsor, was responsible for giving her duties and responsibilities.

On July 29, 2021, the Agency dismissed the complaint as being untimely filed pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency reasoned that Complainant received the Notice on June 28, 2021, but did not file her formal complaint until July 14, 2021³, beyond the 15-day time limit. The Agency also dismissed claims (j), (k), (l), and (m) for failure to state a claim, finding that Complainant did not allege she suffered a present harm or loss with respect to a term or condition of her employment.

On appeal, Complainant argues that the Agency's dismissal should be reversed because the Agency did not provide sufficient evidence of when Complainant received the Notice. Alternatively, Complainant contends that the time limit should be tolled since her attorney was responsible for filing the complaint, the delay was only one day, and the Agency was not prejudiced by the lateness. Complainant also asserts the Agency erred in dismissing four of the claims for failure to state a claim because each incident is part of the alleged pattern of harassment and hostile work environment.

² The Agency's decision gave the date as November 2021 but noted that it assumed Complainant intended for the date to be November 2020.

³ The Agency's decision erroneously stated the formal complaint was filed on June 14, 2021, rather than July 14, 2021.

The Agency opposes the appeal, arguing that it sufficiently supported its determination that the complaint was untimely filed and Complainant has not provided adequate justification for tolling the 15-day time limit. The Agency also argues that claims (j) – (m) were properly dismissed for failure to state a claim.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.106(b) requires the filing of a complaint with an appropriate agency official within 15 calendar days after the date of receipt of the notice of the right to file a formal complaint. An agency shall dismiss a complaint or a portion of a complaint that fails to comply with the 15-day time limit contained in 29 C.F.R. § 1614.107(a)(2), unless the agency extends the time limits in accordance with 29 C.F.R. § 1614.604(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 (Jan. 4, 1994) (quoting Williams v. Dep’t of Defense, EEOC Request No. 05920506 (Aug. 25, 1992)). In instances of untimely filing, the Agency must not only demonstrate that the complainant received Notice, but that the Notice clearly informed the complainant of the 15 day deadline to file. See Paoletti v. U. S. Postal Serv., EEOC Request No. 05950259 (Aug. 17, 1995).

We find that the instant record⁴ establishes that the complaint was untimely filed. The record contains a copy of a June 28, 2021 email regarding Notice of Right to File a Formal Complaint.

⁴ Following its initial submission of the 237-page complaint file, the Agency brief included an attachment entitled “Agency Record”. The approximately 100-page attachment contained documents that should have been provided as part of the complaint file, but inexplicably were not. The Agency’s file uploads were not in compliance with the Commission’s digital submission requirements. The Commission’s regulations at 29 C.F.R. § 1614.403(g) provide, “Agencies are required to submit appeals, complaint files, and other filings to the Office of Federal Operations **in a digital format acceptable to the Commission**, absent a showing of good cause why an agency cannot submit digital records [emphasis added].”

EEO MD-110 requires that all submissions on appeal be consolidated into **as few files as possible**. Including documents as an attachment to a file, as the Agency did here, **does not comply** with the Commission’s requirement that submissions on appeal be consolidated. The Agency is strongly cautioned that submitting files as an attachment to another document, rather than consolidated into the record, runs the risk that they are not easily accessed and appropriately considered by the reviewing attorney. The Instructions for consolidating multiple files can be found at: <http://www.adobe.com/video/feature-detail/acrobat/axi/merge-pdf-files-into->

The attached Notice clearly stated Complainant had fifteen calendar days from the receipt of the Notice in which to file a formal complaint. Complainant acknowledged receipt of the Notice by return email also on June 28, 2021, approximately three minutes later. However, Complainant did not file her formal complaint until July 14, 2021, one day after the 15-day time limit had elapsed. Therefore, we find that the Agency properly found that Complainant did not timely file her complaint.

As noted above, Complainant argues that the one-day delay should be equitably tolled because her former attorney was responsible for timely filing the complaint and therefore she should not be penalized for the attorney's mistake. The Commission, however, is not persuaded. The Commission has stated that a complainant is responsible for proceeding with the complaint at all times, whether or not the complainant has designated a representative. 29 C.F.R. §1614.605(e). Because Complainants are statutorily responsible for processing their complaint at all times, a representative's failure to comport with required deadlines does not create good cause for delay where none exists. see e.g. Bacaoco v. Dep't of the Air Force, EEOC Appeal No. 0520110665, (Feb. 22, 2012) (finding that attorney error alone was insufficient to set aside dismissal of a case where no good cause was shown for untimely delay). If a complainant or the complainant's representative does not file a complaint within the designated time limit, the complaint is untimely and will be dismissed by the Commission unless the principles of waiver, estoppel or equitable tolling apply. 29 C.F.R. § 1614.604(c); see also Forney v. U.S. Postal Serv., EEOC Appeal No. 01983683 (June 10, 1999); Mongeau v. U.S. Postal Serv., EEOC Appeal No. 01951972 (Nov. 13, 1995).

As for Complainant's assertion, that equitable tolling should apply because the Agency was not prejudiced by the one-day delay, we are not persuaded. Neither Complainant nor her attorney has offered any reason for the untimely filing. The evidence in the record does not indicate that Complainant took responsibility to ensure compliance with the applicable time limit. See Jessica E. v. U.S. Postal Serv., EEOC Doc 0120160083 (Jan. 12, 2016) (dismissal of untimely filed complaint upheld, despite Complainant's argument that Agency was not prejudiced by brief delay and the absence of an improper purpose). We therefore find that Complainant has not presented adequate justification to toll the time limit for filing a formal complaint.⁵

CONCLUSION

For the foregoing reasons, the Agency's final decision dismissing the complaint is **AFFIRMED**.

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⁵ Because we affirm the Agency's dismissal of the complaint as untimely filed, we need not address whether claims (j), (k), (l), and (m) were also appropriately dismissed for failure to state a claim.

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

November 29, 2021

Date