



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

[REDACTED]
Michelle T.,¹
Complainant,

v.

Avril Haines,
Director,
Office of the Director of National Intelligence,
Agency.

Appeal No. 2020003649

Hearing No. 570-2016-01295X

Agency No. 2014-F-003

DECISION

Complainant filed notice of appeal on June 3, 2020, to the Equal Employment Opportunity Commission (EEOC or Commission) from an April 18, 2019 EEOC Administrative Judge order of dismissal concerning a formal complaint of unlawful employment discrimination alleging a 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 was placed by a staffing firm, General Dynamics Information Technology, as a Senior Functional Analyst with the Agency's Review and Release Branch, Freedom of Information Office, Information Management Division, located in the Washington, D.C. metropolitan area.

On February 15, 2013, the staffing firm informed Complainant that her supervisor at the Agency had requested that Complainant be removed from her position.

On October 31, 2013, Complainant initiated contact with an Agency EEO counselor. The Agency and Complainant were not able to resolve the matter informally.

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 14, 2014, Complainant filed a formal complaint alleging that the Agency discriminated against her based on race (African American), color (Black), and sex (female) when:

1. She was terminated from employment on March 1, 2013.
2. Complainant's supervisor at the Agency made negative comments about Complainant to other Agency components, preventing Complainant from getting a job with them prior to her termination, and she was not rehired by another staffing firm to serve the Agency in July 2013, based on the perceived attitude of her former supervisor at the Agency.

On June 6, 2014, the Agency issued a final decision, dismissing the formal complaint for failure to state a claim. The Agency found that Complainant was not an employee of the Agency. On June 25, 2014, Complainant filed a timely appeal from the Agency final decision. On appeal, the Commission found that the Agency had exercised sufficient control over Complainant's employment to qualify as a joint-employer. EEOC reversed and remanded the dismissal decision to the Agency for further processing. See EEOC Appeal No. 0120143059 (Nov. 17, 2015).

In June 2016, the Agency completed an investigation into Complainant's formal complaint. The Agency provided Complainant with notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

However, on April 18, 2019, the AJ assigned to the case issued a notice of dismissal of the complaint, concluding Complainant's initial EEO counselor contact on October 31, 2013, was untimely under 29 C.F.R. § 1614.105(a)(1) and 29 C.F.R. § 1614.107(a)(2). The AJ determined that Complainant should have reasonably suspected discrimination long before she initiated counseling because she was aware that her supervisor at the Agency had purportedly made racist comments before Complainant's joint-employment assignment was terminated on February 8, 2013. The AJ rejected Complainant's argument that she was unaware of the EEO process or timelines because she was a contractor. The AJ concluded that Complainant began to pursue the EEO process by contacting attorneys in July 2013 and August 2013, but her circumstances did not warrant tolling the applicable 45-day time limit for EEO counselor contact.

The Agency did not issue a final action following the AJ's dismissal. Consequently, the AJ's decision became the final action of the Agency pursuant to 29 C.F.R. § 1614.109(i).

On June 3, 2020, Complainant filed the present appeal. Through legal counsel, Complainant contended that the AJ's decision was incorrect because the Agency failed to sufficiently provide evidence of Complainant's untimeliness. Complainant further reasserted that Complainant had been unaware of the time limit for EEO counselor contact, and that Complainant had never received EEO training.

Complainant denied seeing EEO posters at the Agency. Counsel stated that Complainant had exercised due diligence by inquiring about the EEO process, but was misdirected because of her EEO-status as a terminated contract employee. Counsel explained that, it was not until August 2013, that an attorney advised Complainant to contact EEOC directly. Complainant did so. On an unspecified date in September 2013, an EEOC AJ (who was not assigned to her case) called Complainant directly and informed her that she needed to initiate the EEO process with the Agency.

The Agency opposed the appeal by supporting the AJ's dismissal based on untimely EEO Counselor contact. Additionally, the Agency stated Complainant appeal was untimely because the AJ decision issued on April 18, 2019 but Complainant did not appeal it until June 3, 2020.

ANALYSIS AND FINDINGS

Timeliness on Appeal

We reject the Agency's position that this appeal was untimely filed. Appeals to the Commission must be filed within thirty calendar days after Complainant receives the Agency's final action. 29 C.F.R. § 1614.402(a). Here, however, the Agency failed to issue a final order on the AJ's decision and by operation of the regulations the AJ's decision became final. Under such circumstances, there is no clear regulatory deadline for the filing of an appeal. In this case, we conclude that Complainant's appeal was filed within the bounds of a reasonable time frame. As such, we find that the Agency did not meet its burden to show that Complainant's appeal was untimely.

Complainant's Argument of Estoppel

We also note that Complainant's counsel has argued that because the Agency investigated her claims, the Agency was estopped from using untimely EEO counselor contact as a defense to oppose Complainant's complaint. However, we have previously held that, in many circumstances, acceptance and investigation of a complaint does not estop an agency from subsequently rejecting the complaint due to a procedural defect. Baldwin v. Dep't of the Treasury, EEOC Request No. 05890561 (Aug. 25, 1989).

Timeliness of EEO Counselor Contact

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires bringing complaints of discrimination to the attention of the EEO Counselor within forty-five days of the date of the matter alleged to be discriminatory or, within forty-five days of the effective date of a personnel action. Pursuant to 29 C.F.R. § 1614.105(a)(2), if complainant was unaware of the time limit, did not know that the discriminatory action had occurred, that circumstances beyond her control prevented contacting the EEO Counselor, or if she provided a reason deemed sufficient, then EEOC or the Agency must toll that time limit.

Here, Complainant has explained that she did not receive EEO training because she worked as a contract employee at the Agency. Complainant stated that she was unaware of the EEO process or the applicable timelines. In February 2013, when she was removed from her assignment with the Agency, Complainant was not advised of her EEO rights. Based on Complainant's narrative statement to the EEO Counselor, after removal from her first assignment with the Agency, she was unsure of her status as an employee with General Dynamics Information Technology, as well as whether she was in a position to contest the Agency's adverse actions. In the months that followed her removal from her prior assignment, General Dynamics Information Technology attempted to place Complainant in a different assignment with the Agency, but ultimately failed to do so. Complainant believed that her former supervisor at the Agency had prevented her from being reassigned or rehired. We find the record is, at best, unclear as to when Complainant became sufficiently aware of the EEO process or applicable deadlines. In any event, the Agency proffered no evidence whatsoever to challenge Complainant's lack of EEO awareness. 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. Department of Energy, EEOC Request No. 05930703 (January 4, 1994) (quoting Williams v. Department of Defense, EEOC Request No. 05920506 (August 25, 1992)). The Agency has failed to meet this burden.

Based on the foregoing, we find that the AJ improperly dismissed Complainant's claims for untimely EEO contact.

CONCLUSION

Accordingly, we REVERSE the AJ's order of dismissal and REMAND Complainant's claims for processing in accordance with the ORDER below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, the Agency shall submit a renewed request for a hearing, a copy of this appellate decision, and the complaint file to the Hearings Unit of the EEOC's Washington Field Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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

January 20, 2022
Date