



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Bennie S.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(U.S. Coast Guard),
Agency.

Appeal No. 2021004250

Agency No. HS-USCG-00486-2021

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 20, 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Painter Leader, WG-09, at the Agency's Coast Guard Yard in Baltimore, Maryland.

On April 5, 2021, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination and harassment (non-sexual) on the bases of race (Caucasian), color (White), age (62), and reprisal for prior protected EEO activity when:

1. In 2015, the Painter Foreman refused to represent Complainant as his appointed union representative during an age discrimination case; and
2. From March 2020 – September 2020, the Painter Foreman posted defaming pictures of Complainant.

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.

The Agency dismissed these claims pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact. Complainant filed the instant appeal.

On appeal, Complainant contends he contacted an EEO Counselor with 10 days of the discriminatory act. He further contends that he has been subjected to ongoing harassment. He stated the Agency initiated an investigation in October 2020, which falls within the parameters of the time frame required. Complainant “does not feel his Formal Complaint was filed untimely and respectfully requests to have this ongoing age discrimination investigated.” (Complainant Appeal Brief, pp. 1-2).

The Agency contends on appeal that while Complainant did contact an EEO counselor on both September 18, 2020 and again on December 14, 2020, he declined to move forward with the EEO complaint process at those times. The Agency states that on both occasions, Complainant was sent a follow up email reminding him of the 45 day time limit for EEO Counselor contact, but Complainant ultimately did not choose to begin the EEO complaint process until December 29, 2020, more than 45 days after the alleged discrimination and harassment had occurred. The Agency asserts that Complainant failed to offer any reasonable justification to warrant an extension, estoppel, or equitable tolling of the time limit.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. §1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO 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. EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides for the dismissal of complaints where the complainant did not initiate timely contact with an EEO counselor within 45-day limitation period.

A complainant satisfies the requirement of counselor contact by contacting an agency official “logically connected” with the EEO process *and* by exhibiting an intent to begin the EEO process. See Jayna A. v. U.S. Postal Serv., EEOC Appeal No. 2019000179 (Nov. 29, 2018), citing Cristantiello v. Dep’t of the Army, EEOC Appeal No. 01992817 (Dec. 19, 2000), Cox v. Dep’t of Hous. and Urban Dev., EEOC Request No. 05980083 (July 30, 1998); Allen v. U.S. Postal Serv., EEOC Request No. 05950933 (July 9, 1996); Jones v. Dep’t of the Army, EEOC Request No. 05900435 (Sept. 7, 1990).

Here, Complainant’s claims involved discriminatory events occurring in 2015 and from March 2020 through September 2020. Although Complaint initially contacted an EEO counselor on September 18, 2020, he declined to proceed with the EEO process at that time. (Complaint File, p. 39). He did not express an intent to begin the EEO process until he contacted an EEO Counselor on December 29, 2020, more than 45 days after the allegedly discriminatory events.

Complainant contends on appeal that the harassment is ongoing, but his formal complaint indicates that the events at issue occurred in 2015 and “from March 2020 through September 2020” and Complainant has not indicated there were any specific subsequent allegedly discriminatory events within the applicable 45-day period. Complainant also notes there was an investigation by the Agency in October 2020. However, “the Commission has consistently held that internal appeals or informal efforts to challenge an agency's adverse action do not toll the running of the time limit to contact an EEO Counselor. See Hosford v. Department of Veterans Affairs, EEOC Request No. 05890038 (June 9, 1989); Miller v. United States Postal Service, EEOC Request No. 05880835 (February 2, 1989).” Mike G. v. Dep’t of the Army, EEOC Request No. 0120151129 (March 30, 2016).

Complainant has not provided sufficient justification to warrant tolling of the time limits. His EEO Counselor contact was not timely. As such, the Agency correctly dismissed the complaint.

CONCLUSION

The Agency's final decision dismissing the formal complaint is **AFFIRMED** for the reasons discussed above.

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

January 10, 2022

Date