



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

[REDACTED]
Joette R.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2020005002

Hearing No. 570-2019-01055X

Agency No. 20DR-0020-2018102903

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 25, 2020, final order concerning her equal employment opportunity (EEO) complaint alleging 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final order and REMANDS the complaint for further action.

BACKGROUND

Complainant worked as a Senior Advisor for Veteran Employment at the Agency's Office of Economic Opportunity in Washington, D.C. Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability (physical and mental), and in reprisal for prior protected EEO activity (instant EEO complaint), when she was subjected to harassment. Complainant specified ten incidents of alleged harassment, including her removal from federal service (claim 10). The Agency accepted the harassment claim and the removal claim as a timely discrete claim.

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 informed Complainant that it would complete the investigation within 120 days, and then issue a final decision within 45 days, which Complainant could appeal to the Merit Systems Protection Board (MSPB). Report of Investigation (ROI) Section 3-2.

Complainant amended her complaint to include additional claims and incidents of harassment. The Agency issued a revised acceptance letter and moved the removal claim to claim 11, and added a new claim 10, when Complainant was sent disparaging emails about her performance. The Agency noted that “claim 10” was accepted as a timely discrete claim, but it did not state that the removal claim, now claim 11, was still accepted as a discrete claim. The Agency informed Complainant that the investigation would conclude within 180 days, and upon its completion, Complainant could elect a final agency decision or a hearing before an EEOC Administrative Judge (AJ). ROI Section 3-1.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC AJ. On May 8, 2020, the Agency filed a Motion to Dismiss Complainant’s complaint for untimely filing of her formal complaint. The Agency asserted that Complainant was electronically issued her Notice of Right to File a Formal Complaint (NRTF) on May 30, 2018. The Agency noted that Complainant was directed to the Safe Access File Exchange (SAFE) to obtain a copy of the NRTF. On June 12, 2018, Complainant emailed the EEO Counselor and informed him that she was having trouble retrieving the files and noted that she needed to “file a formal complaint by tomorrow.” On June 13, 2018, the EEO Counselor emailed Complainant the NRTF, and Complainant acknowledged its receipt and stated that she would fax her formal complaint that day. However, the Agency noted that Complainant did not file her formal complaint until June 29, 2018, and it asserted that there was no evidence in the record that would warrant a waiver, estoppel, or equitable tolling of the 15-day deadline to file Complainant’s formal complaint.

Complainant timely opposed the Agency’s motion. Complainant explained her difficulty in using the secure system as a non-government employee, and she averred that she timely faxed her formal complaint around 11:30 p.m. Eastern Standard Time (EST) on June 28, 2018, which the fax coversheet showed as June 29, 2018, based on Greenwich Mean Time (GMT), which was four or five hours ahead, depending on the time of year.² Complainant also noted that the Agency accepted her complaint and investigated her allegations, and she argued that the Agency’s Motion to Dismiss should be denied.

On May 26, 2020, the AJ dismissed Complainant’s complaint as untimely. The AJ determined that it was undisputed that, on June 12, 2018, Complainant acknowledged that her formal complaint was due the following day; and on June 13, 2018, she stated that she would fax her

² GMT is four hours ahead of EST during daylight saving time, and five hours ahead during the remainder of the year.

complaint that day. However, Complainant did not fax her complaint until June 28, 2018,³ and she did not show good cause for filing the complaint on June 28, 2018, rather than June 13, 2018.

The AJ also noted in the dismissal that the parties raised a possible matter in connection with an MSPB appeal. In order to determine whether Complainant's EEO claims arose from the same nucleus of operative facts as her removal and whether they could sensibly be disassociated from the mixed discharge claim, the AJ ordered the parties to brief her on the details on Complainant's MSPB matter. However, the AJ stated that she would have scheduled deadlines for the parties' briefs on MSPB jurisdiction, but this was precluded based on her decision to dismiss the case as untimely filed.

The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

Through her attorney, Complainant argues that the AJ erred when she dismissed the complaint because it was undisputed that Complainant did not receive the NRTF until June 13, 2018, and therefore, her 15-day deadline was June 28, 2018. Complainant states that, while the EEO Counselor emailed her on May 30, 2018, and informed her that the NRTF was available on SAFE; the system deleted the document on June 8, 2018. Complainant emailed the EEO Counselor to inform him that she was unable to access the NRTF on SAFE on June 12, 2018. The EEO Counselor emailed Complainant a copy of the NRTF on June 13, 2018. Complainant confirmed her receipt of the NRTF and asked when her formal complaint was due. Complainant states that the EEO Counselor instructed her that the deadline was June 28, 2018.

Complainant asserts that the Agency baselessly noted that she filed her formal complaint on June 29, 2018, and that she indisputably filed her formal complaint on June 28, 2018. Complainant requests that the Commission reverse the Agency's final order and reinstate her complaint for processing. With her appeal, Complainant provided a copy of the EEO Counselor's June 13, 2018, email in which he informed Complainant that she had "until June 28th to submit your formal complaint."⁴

The Agency responds that the AJ conducted a thorough review and utilized her authority under the Commission's regulations to dismiss the instant EEO complaint on the basis that Complainant failed to meet the formal complaint filing deadline.

³ The AJ stated that it was immaterial if Complainant faxed her formal complaint of June 28, or 29, 2018.

⁴ We note that this email was not previously included in the record and we remind the Agency of its obligation to produce a complete record with the Commission as well as before the AJ.

ANALYSIS AND FINDINGS

EEOC regulation requires that complaints of discrimination must be filed within 15 days of receipt of the notice informing a complainant of his or her right to file a discrimination complaint. 29 C.F.R. § 1614.106(b). An agency shall dismiss a complaint which fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.105, unless the agency extends the time limits in accordance with § 1614.604(c), which provides that the filing limitation period is subject to waiver, estoppel, and equitable tolling. 29 C.F.R. § 1614.107(a)(2).

Based on our review of the record, we find that Complainant did not obtain her NRTF until the EEO Counselor emailed her a copy on June 13, 2018. While the Agency asserted that Complainant was electronically issued her NRTF on May 30, 2018, the record shows the SAFE status of the NRTF as “Not Downloaded” by Complainant. ROI Section 2-1. It is undisputed that Complainant informed the EEO Counselor that she had difficulties retrieving the NRTF through SAFE on June 12, 2018, and that the EEO Counselor emailed the NRTF on June 13, 2018. We also note that the Agency acknowledged the date of Complainant’s receipt of the NRTF as June 13, 2018, in the EEO Counselor’s Report and Notice of Acceptance. ROI Sections 2-1, 3-2. As such, we find that Complainant’s deadline to file her formal complaint was 15 days after June 13, 2018, which was June 28, 2018.

Further, the Commission has previously held that an agency may not dismiss a complaint based on a complainant’s untimeliness, if that untimeliness is caused by the Agency’s action in misleading or misinforming the complainant. See Wilkinson v. U.S. Postal Serv., EEOC Request No. 05950205 (Mar. 25, 1996). See also Elijah v. Dep’t of the Army, EEOC Request No. 05950632 (Mar. 28, 1996) (if agency officials misled complainant into waiting to initiate EEO counseling, agency must extend time limit for contacting EEO Counselor). To the extent that the Agency argues that Complainant received her NRTF before June 13, 2018, we find that the EEO Counselor specifically informed Complainant that her deadline to file her formal complaint was June 28, 2018, and if this was not true, he misinformed Complainant.

While the Agency determined that Complainant’s formal complaint was filed on June 29, 2018, we find that Complainant correctly highlights that her fax shows that her formal complaint was filed on 3:34 a.m. GMT on June 29, 2018, which was 11:34 p.m. EST on June 28, 2018. In addition, the Agency’s copies of Complainant’s formal complaint documents consistently show a GMT time. ROI Section 1.1 We find that Complainant’s formal complaint was timely filed on June 28, 2018. As such, we REVERSE the Agency’s final order and REMAND the matter for further action, in accordance with the Order below.

Complainant’s complaint should be reinstated to the point in which processing ceased. However, the status of Complainant’s removal claim is unclear, as noted by the AJ in her dismissal order. Accordingly, the Agency should clarify the claims in the instant complaint when it submits a copy of the complaint file to the EEOC Hearings Unit.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, and arguments and evidence not specifically discussed in this decision, the Commission REVERSES the Agency's final action and REMANDS the matter to the Agency in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC's Washington Field Office Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. With the complaint file, the Agency shall clarify the claims that are properly included in the instant complaint. 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 resumes the processing of the complaint 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

March 2, 2022
Date