



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

[REDACTED]
Rodrigo C.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2021004964

Hearing No. 570-2021-00323X

Agency No. BOP-2020-0592

DECISION

On September 9, 2021, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 25, 2021 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of 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 Case Manager, GS-0101-11, at the Agency's Federal Correctional Institution, Fort Dix at Joint Base McGuire-Dix-Lakehurst, New Jersey.

On May 9, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of age (49) and reprisal for prior protected EEO activity when, from November 29, 2019 to May 9, 2020, Complainant was subjected to harassment by his supervisor.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

Over Complainant's objections, the AJ assigned to the case issued a decision on July 20, 2021, dismissing the complaint on the grounds that Complainant's filing of the formal complaint was untimely. Specifically, the AJ found that on April 11, 2020, Complainant received an email from the Agency EEO Counselor containing his Notice of Right to File ("Notice"), but did not file his formal complaint until May 9, 2020, beyond the 15-day regulatory time limit. The Agency subsequently issued a final order adopting the AJ's dismissal.

The instant appeal followed.

ANALYSIS AND FINDINGS

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that a complaint should be dismissed that fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.106, which, in turn, requires the filing of a formal complaint within fifteen (15) days of receiving notice of the right to do so.

Here, Complainant does not deny that he received an email containing the Notice of right to file his complaint on April 11, 2020. Nor does he deny that he did not file his formal complaint until May 9, 2020. Complainant states that he chose not to *open* the email containing the Notice right away because of the gravity of filing a complaint against his supervisor. He asserts that he believed the 15-day filing period did not begin until he opened the email. Complainant argues that this belief was based on information he received from the Agency's EEO Counselor. Complainant argues that he did not open the email containing the Notice until April 24, 2020, hence making his May 9 filing timely.

The record shows that on May 2, 2020, Complainant responded to the April 11 Notice from the EEO Counselor saying, "I am validating that this was opened by me on 4/24/20 making the 15-day time period expiration as 5/6/20?" The record further shows that the Counselor responded that same day saying, "Yes, you opened/read/received the Notice of Right to File on April 24, 2020 and the 15th day is May 9, 2020." The AJ found that such a response from the EEO Counselor did not constitute a waiver of the applicable time limits by the Agency and that instead, "The counselor was merely restating that Complainant had 15 days from the time that he received it and she assumed that he "opened/read/received" the e-mail on April 24, 2020, as Complainant stated."

EEOC's regulations concerning receipt of the notice of right to file were promulgated prior to the advent of transmission of such documents by email. Since then, we have determined what constitutes "receipt" of an email on a case-by-case basis. While the Agency argues in its response to the appeal that receipt should always be determined by when the email was delivered to the complainant's email account, we have considered many other factors in making this

determination. Therefore, in the present case, we must examine the particular circumstances presented here in determining when to construe Complainant's receipt of the Notice.

While Complainant has argued that he believed that the 15-day filing period did not begin until he actually opened the email containing the Notice, the record shows that Complainant was provided, and signed, numerous documents during counseling that all specified that the 15-day clock started running when the Notice was "received". None of these documents made any reference to the clock starting to run once the email was opened. Here, Complainant fully concedes that he was aware that he had received the email on April 11, knew it contained the Notice, and was aware of the 15-day filing period. He further concedes that he affirmatively chose not to open the email until April 24, 13 days after the email was delivered to his email account, in order to prevent the filing period time from starting because he wanted more time to think about whether or not he really wanted to file a formal complaint.

At the time he opened the email, Complainant still had two days left in the filing period from when the email was delivered to his email account. To the extent he was confused by what constituted receipt, he could have sought clarification from the Agency at that time and still met the 15-day deadline. Instead, Complainant waited eight more days (May 2), until after the 15-day period of the date of the Notice email had expired, to seek clarification on when the clock began to run. As a result, to the extent that the EEO Counselor's response provided him with misleading information, Complainant could not have relied on that information to make the decision not to file within 15 days of the delivery of the Notice email. Complainant cannot, therefore, rely on inaccurate information provided by the EEO Counselor on May 2 to excuse any late filing.

In addition, for the first time on appeal, Complainant has submitted a copy of Agency "Program Statement 3713.24" that states the 15-day timeframe to submit a formal discrimination complaint commences when the "aggrieved party opens his/her email". Complainant's Brief in Support of Appeal, Attachment 1. We note, however, that Complainant has not claimed that he reviewed or was even aware of this document prior to receiving the Notice and filing his formal complaint. Therefore, this document also does not support his argument that he was misled by the Agency.

Finally, Complainant argues that he was prevented by exigent circumstances from filing the complaint in a timely manner. Specifically, Complainant points out that he received the Notice at the height of the Coronavirus pandemic and that:

[D]uring the period in question, I was tasked with executing a number of critical functions, these included the movement of a large number of inmates from my current duty station (housing unit 5703) in order to set up the physical environment as a quarantine unit for infected inmates in order to safeguard the larger inmate population, staff, and ensure institutional security needs. This is analogous to the National Guard Field Hospitals set up in New York City or erected on the grounds of FCI Elkton, Ohio, at that time. This required additional time supervising the disposal, retrieval and resetting of the entire 368 bed unit

with mattresses, bunks, lockers, cleaning supplies, PPE, creation of the Donning and Doffing areas and all logistical considerations related to satellite feeding, in addition to creating access availability for all laundry, commissary and medical supplies and monitoring for all activities, to include recreation and educational materials for the inmate population during what was being projected to be, at the time, a minimum 6 week lockdown.

At this point I was also tasked with the coordination of and distribution of relocated inmate central files to the reassignment units from these displaced inmates. This movement in order to be in accordance with BOP policy, mandates a required 100% accountability and the hand to hand transfer of these files for accountability purposes. These are all additional duties that were to be performed, beyond what is considered "normal" in the execution of my regular duties. Understandably, for a large portion of this time in question, I would not have been present at my desk, and if so, only to look at relevant and necessary task related correspondence. My focus was necessarily directed toward continuing institutional operations and my duties to the employer as opposed to devoting attention toward the EEO matter currently before us.

Additionally, as a case manager I had to also evaluate all the assigned inmates under urgent guidance for review of the suitability for individual consideration of expedited inclusion for placement in Home Confinement of any medically "at risk" inmates under expanded authority provided by the Attorney General in relation to the pandemic, while making determinations related to the public safety concerns they might pose.

Overall, the issues as they presented themselves at this time and in this unknown, emerging dynamic are themselves the very definition of exigent circumstances.

While we recognize that the period in question was a fraught time and that, by his account, Complainant and his colleagues behaved with great dedication, professionalism and bravery in carrying out their mission, we note that Complainant has not explained why he could not have forwarded the Notice to his personal email address and filed his formal complaint on his own time. In sum, while Complainant describes a very hectic work environment during the period he received the Notice, he has not shown that he was unable to timely respond.

Following a review of the record, under the unique facts presented in this case, we find that Complainant has presented no persuasive arguments or evidence warranting an extension of the time limit for filing his formal complaint.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order adopting the AJ's decision dismissing the complaint.

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

February 28, 2022

Date