



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

[REDACTED]
Erich A.,¹
Complainant,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 2022002013

Agency No. 8Z0J2200125

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's January 13, 2022, dismissal of 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Recreation Aid, NF-01, at the Warhawk Fitness Center for the 502nd Force Support Squadron, on Lackland Air Force Base, in Lackland, Texas.

On December 22, 2021, Complainant filed a Formal EEO Complaint alleging that the Agency subjected her to harassment/a hostile work environment on the bases of race (Asian), national origin (Hong Kong), and sex (female) when:

1. On September 12, 2021, her male coworker (“C1”), who was also an NF-01 Recreation Aid, asked, “is your husband older?” and, later that day, when Complainant was at the front desk, asked if she liked massages,²

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.

2. On September 14, 2021, C1 looked at her outfit and stated, "Ooh, Ooh, Ooh!" when he saw her outside the Aerobic Room,
3. On September 14, 2021, C1 told her to stop mopping the floor, and when she didn't, explaining that she was following instructions, C1 became "aggressive," grabbed the mop and tried to forcibly take it from her, Complainant was "shocked and terrified," so she said loudly, "No, No, No, I can take care of my own mop," then, C1 "seemed to come to his senses" and left the room immediately,
4. On September 14, 2021, Complainant went to the staff room and sought help from her male coworker ("C2"), an NF-03 Recreation Aid, but when she told him about C1 grabbing her mop, C2 did not respond; she repeated herself, but C2 still did not respond, acting like she "did not exist,"
5. On September 17, 2021, C2 initiated a conversation with her where he appeared to "put in great effort defending [C1's] sexual harassment behavior;" Complainant said she did not want to talk about C1, but C2 asked her if she "knew how the brain worked," and drew circles on a post-it note while explaining that "men at [C1's] age are just like young men, they don't think with their head, they think with their (points to his crotch). All they think about is sex... they are like animals." When Complainant stated that men and women in uniform are respectful, C2 began to talk about how they "do crazy things in the dorm,"
6. On unspecified dates during the second half of September 2021, C2 made the following comments to Complainant while she was at the front desk:
 - a. In reference to a female manager (C2's prior supervisor), C2 said she had no management experience, he did not know how she got that job, once she "wore Victoria's Secret style Lingerie ...you know ... sexy underwear," and when she worked across the street, "she slept with everyone in the office" (Complainant asked how C2 knew this, he paused, then said, "I know"),
 - b. In reference to a male employee, C2 asked, "how did he not get that job?" noting his military background and experience; C2 also made comments asking why another N-03 was a manager and he (C2) was not,
 - c. C2 said female customers wanted him to show them equipment so he would touch them (on their hands) and they wanted to hang out with him, and,

² On or about September 12, 2021, Complainant's discomfort around C1 increased, as she learned that C1 was the subject of a sexual harassment complaint.

- d. C2 asked, "[Complainant,] people like you, how do you say ...Immigrants? Immigrants, right? So ... when you guys come to the US, the first job you land is usually in a nail salon, right?"

The Agency dismissed Complainant's complaint for untimely contact with an EEO Counselor, pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency reasoned that Complainant contacted an EEO Counselor on November 9, 2021, more than forty-five days after the allegedly discriminatory events.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. §1614.107(a)(2), an agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105, §1614.106 and §1614.204(c), unless the Agency extends the time limits in accordance with §1614.604(c). EEOC Regulation 29 C.F.R. § 1614.105(a)(1), in turn, provides that complaints of discrimination should be brought to the attention of the EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

As noted above, in its decision the Agency found that Complainant did not contact an EEO Counselor until November 9, 2021. However, on appeal, Complainant contends that she was "well aware" of the forty-five day time limit and made timely contact. Specifically, Complainant argues that on October 19, 2021, she received an email response from the EEO Counselor to her initial contact regarding the September 14, 2021 incident and alleged sexual harassment.

In support Complainant provides several email exchanges with the EEO Counselor. The email documentation establishes the following events:

On Friday, October 22, 2021, Complainant was provided with the Intake Packet via email and instructed to submit the completed packet to the EEO Counselor by Monday, October 25, 2021. On October 24, 2021, Complainant notified the EEO Counselor that she required additional time because she was scheduled to work every day from October 22 – 26, 2021. The EEO Counselor responded by asking if Complainant could provide the documents by October 27, 2021, then "if not, you can close your contact for the time being and when you are ready to submit the intake packet you can contact our office." Complainant responded that if she was unable to submit the package by October 27, 2021, she would "close [her] contact for the time being." Complainant submitted the package on October 27, 2021.

On November 1, 2021, the EEO Counselor notified Complainant that she needed to sign the documents. The same day, Complainant added her signature and returned the package to the EEO Counselor. On November 3, 2021, the EEO Counselor emailed, asking Complainant to complete and submit an attached "Withdrawal Form," that day. The email clarified: "*This by no means does not mean you cannot file a complaint.* When you are ready to submit your complaint please contact the EO office" (emphasis added).

Significantly, the EEO Counselor did not provide Complainant with a deadline to re-initiate her complaint. Complainant responded that she would complete the form and follow up with the EEO office "when she was ready," indicating that she did not intend to withdraw her EEO complaint.

The complaint file submitted by the Agency includes an Intake Packet, which identifies October 18, 2021 as the date of initial contact. It also notes that an "informal complaint filed" on October 27, 2021. However, the record also contains a "Counselor Intake Sheet", authored by a different EEO Counselor that states "date of contact" was November 9, 2021. The Counselor's Report "Summary of Counselor's Inquiry", but the new EEO Counselor, does not mention Complainant's prior EEO contact, nor does a "Legal Review" provided in the record. Complainant's signatures in the Intake Package are dated November 1, 2021, it appears she may have completed another Intake Package in late November. The record contains an email from March 2022 with a copy of the November 3, 2021 email and the "withdrawal form" complainant completed.

We find ample evidence in the instant record that Complainant timely initiated contact with an EEO Counselor on, or days before, October 18, 2021 and that she diligently pursued the processing of her complaint. Moreover, while evidence of bad faith or simply incompetence, we find that the EEO Counselor Complainant first contacted, in October 2021, provided her with inaccurate and confusing advice.

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 addition, in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decisions." See also Gens v. Dep't of Def., EEOC Request No. 05910837 (Jan. 31, 1992). The Agency has not supported its decision to dismiss the complaint for untimely. Rather, the record establishes that, despite unclear and false information from a counselor, Complainant timely initiated the EEO process.

CONCLUSION

The Agency's final decision dismissing Complainant's complaint for untimely EEO contact is REVERSED. The case is REMANDED to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time.

If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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)

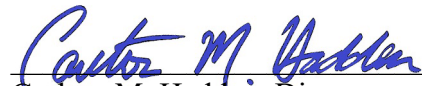
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

August 15, 2022
Date