



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

[REDACTED]  
Matt B.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Defense Logistics Agency),  
Agency.

Appeal No. 2022002901

Agency No. DLAC-22-0101

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 2, 2022, dismissing his complaint alleging unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

During the period at issue, Complainant was an applicant for numerous vacancies in the Agency.

On March 14, 2022, Complainant initiated EEO Counselor contact. Informal efforts at resolution were not successful. On April 12, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of disability when Complainant learned he was not referred as a qualified candidate on the following Agency employment opportunities:

1. Supervisory Security Specialist, GS-0080-13 (Vacancy Announcement DLASC 18-10299882-MP) on September 21, 2018;
2. Contract Specialist, GS-1102-11 (Vacancy Announcement DLALndMartm-19-10394204-MP) on January 22, 2019;

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<sup>1</sup> 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.

3. Business Opportunity Specialist, GS-0301-11 with growth potential to GS-12 (Vacancy Announcement DLALndMartm-19-10573522-MP) on August 28, 2019;
4. Environmental Protection Specialist, GS-0028-11 with growth potential to GS-12 (Vacancy Announcement DLAHRsvcs-DT-19-10577734-DE) on August 29, 2019;
5. Contract Specialist, GS-1102-11 (Vacancy Announcement DLALndMartm-20-10626238-DE) on October 23, 2019;
6. Contract Specialist, GS-1102-09 with growth potential to GS-11 (Vacancy Announcement DLALndMartm-20-10883675-MP) on August 31, 2020;
7. Contract Specialist, GS-1102-09 with growth potential to GS-11 (Vacancy Announcement DLALndMartm-20-10885692-MP) on September 2, 2020;
8. Contract Specialist, GS-1102-09 with growth potential to GS-11 (Vacancy Announcement DLALndMartm-20-10900842-MP) on September 21, 2020;
9. Human Resources Specialist, GS-0201-11 (Vacancy Announcement DLALndMartm-21-1-0970228-DE) on December 7, 2020;
10. Management Assistant, GS-0344-07 (Vacancy Announcement DLADSC-21-10980012-DE) on December 16, 2020;
11. Contract Specialist, GS-1102-9 with growth potential to GS-11 (Vacancy Announcement DLALndMartm-21-11061246-DHA) on April 1, 2021; and
12. Product Data Specialist, GS-0301-09 (Vacancy Announcement DLALndMartm-22-11391269-MP) on March 2, 2022.

On May 2, 2022, the Agency issued a final decision dismissing the complaint pursuant to 29 C.F.R. § 1614.107(a)(2), (5), for untimely EEO Counselor contact regarding claims 1- 10, and mootness regarding claims 11 and 12.

The instant appeal followed.

### ANALYSIS AND FINDINGS

#### Claims 1-10

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an Agency shall dismiss a complaint which fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.105, which, in turn, requires an aggrieved person to initiate contact with a Counselor within 45 day of the effective date of the action. The Commission has adopted a “reasonable suspicion” standard (as opposed to a “supportive facts” standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Department of the Navy, EEOC Request No. 05970852 (February 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

29 C.F.R. § 1614.105(a)(2) provides that the 45-day time limit shall be extended when the aggrieved individual shows that they were not notified of the limitation period and was not otherwise aware of it. On appeal, Complainant states that he was unaware of the 45-day time limit because he is not a federal employee and had not received any training about the EEO complaint process.<sup>2</sup>

The Agency does not provide evidence that Complainant was provided actual notice of the 45-day time limit. Instead, the Agency argues that it established constructive notice because there was a link to its EEO policy on the vacancy announcements. More specifically, the Agency stated that there were three sequential links that would lead to the EEO policy. Complainant refutes this assertion and states that there are only two links. Irrespective of the number of links that would lead to this information, we determine that this passive and indirect path to information about the EEO complaint process is not sufficient, without more, to constitute constructive notice that would readily and efficiently apprise an applicant of the 45-day limitation period. As such, we find that the Agency improperly dismissed claims 1- 10 for untimely EEO Counselor contact.

#### Claims 11 and 12

The regulation set forth at 29 C.F.R. § 1614.107(a)(5) provides for the dismissal of a complaint when the issues raised therein are moot. To determine whether the issues raised in complainant's complaint are moot, the factfinder must ascertain whether: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged

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<sup>2</sup> Additionally, Complainant asserts the Agency misrepresented the reasons for determining his ineligibility, further interfering with when he might reasonably suspect discrimination. Complainant argues that when he suspected discrimination, he contacted human resources (HR) and the EEO office.

discrimination. See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Kuo v. Dep't of the Navy, EEOC Request No. 05970343 (July 10, 1998). When such circumstances exist, no relief is available and no need for a determination of the rights of the parties is presented.

The Agency dismissed claims 11 and 12 for mootness. The Agency specifically determined that Complainant was ultimately referred to the two subject vacancies. Complainant argues that he was referred for the GS-9 position, and not the GS-11 position for Vacancy Announcement DLALndMartm-21-11061246-DHA, in claim 11. Additionally, Complainant argues, regarding Vacancy Announcement DLALndMartm-22-11391269-MP in claim 12, that while he was referred to the selecting official, he was not referred until after contacting HR to show that he had been wrongfully categorized as ineligible. We are persuaded by Complainant's appellate argument that the essence of all the claims raised in the formal complaint is that he was subjected to a discriminatory practice or policy in a pattern of repeated determinations of ineligibility, as reflected in claims 1 – 10. We therefore determine that claims 11 and 12 were not rendered moot.

### CONCLUSION

The Agency's final decision dismissing the formal complaint is REVERSED. The formal complaint is REMANDED to the Agency for further processing in accordance with the ORDER below.

### ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

August 16, 2022

Date