



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

[REDACTED]
Porter H.,¹
Complainant,

v.

Kevin K. McAleenan,
Acting Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 0120181059

Hearing No. 480201600377X

Agency No. HSTSA233402015

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's January 4, 2018 Final Order concerning his EEO 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., 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 was employed by the Agency as a Master Behavior Detection Officer (“MBDO”) at the Los Angeles International Airport (“LAX”) in Los Angeles, California.

On March 29, 2015, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Asian), sex (male), color (medium-fair brown), and age (67) when, on or about January 31, 2015, Management forced him to use his sick and annual leave after he was issued a Notice of Proposed Removal (“NOPR”).

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.

On November 15, 2014, Complainant was provided with Notice of Proposed Removal (“NOPR”) on the grounds that he was medically unfit for his position. According to the NOPR, the Agency’s Office of the Chief Medical Officer (“OCMO”) based its determination on a left foot deformity Complainant had since birth. At the time, Complainant had been working as a MBDO at LAX for 6 years. The NOPR was issued by the Deputy Assistant Federal Security Director (“D1”) (Hispanic, male, light brown, 41), and delivered by a Transportation Security Manager (“T1”) (Caucasian, male, white, 62).

Because the NOPR was based on medical fitness, Complainant was, under Agency policy, provided 7 days of administrative leave to pursue disability retirement, submit a job questionnaire for open positions within the Agency that met his limitations, or respond to OCMO with medical documentation establishing fitness for duty. Complainant, with the assistance of a representative, chose to respond. Per the NOPR, once his administrative leave expired, Complainant had to use his accrued annual or sick leave until the matter was resolved.

On December 21, 2014, the NOPR was rescinded after Complainant provided additional medical documentation, which was reviewed by the Medical Review Officer in Agency Headquarters. During a December 30, 2014 meeting, and in a January 1, 2015 email, Complainant asked D1 if he could have the 168 hours of annual leave and 16 hours of sick leave that he exhausted while the NOPR was pending, restored.

On January 7, 2015, D1 emailed Complainant, explaining that according to Human Resources, the annual and sick leave he used while his NOPR decision was pending could not be restored. D1 explained, “[Complainant] needed to use [his] leave until this matter was resolved” because he was not eligible to come in to work. Before the NOPR was rescinded, “[Complainant was] considered not fit for duty and pending a final decision of removal.”

On January 31, 2015, Complainant’s representative informed him that Agency’s actions related to the sick and annual leave he used waiting for a decision on the NOPR were discriminatory. Complainant later provided a list of individuals outside his protected classes that he alleges were also issued NOPRs, yet did not have to exhaust their leave.

On or about February 14, 2015, Complainant initiated contact with an EEO Counselor, and the matter was later accepted for investigation. At the conclusion of its investigation, the Agency provided Complainant with a copy of the report of investigation (“ROI”) and notice of his right to request a FAD or a hearing before an EEOC Administrative Judge (“AJ”).

Complainant requested a hearing. On December 21, 2017, over Complainant’s objection, the AJ granted the Agency’s motion to dismiss Complainant’s complaint for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2), and remanded the matter to the Agency for a FAD. On January 4, 2018, the Agency issued a FAD dismissing Complainant’s complaint as untimely. The instant appeal followed.

ANALYSIS AND FINDINGS

In relevant part, 29 C.F.R. § 1614.107(a)(2) provides that the agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity 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.

The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 45-day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 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. See Complainant v. United States Postal Serv., EEOC Appeal No. 0120120499 (Apr. 19, 2012).

The “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 Def., EEOC Request No. 05920506 (Aug. 25, 1992)).

Here, the Agency’s alleged discriminatory action (forcing Complainant to use his annual and sick leave pending a decision on the NOPR), arose from the November 15, 2014 NOPR, a personnel action. The 45-day limitation period was triggered on November 23, 2014, when Complainant’s 7 days of administrative leave provided by the NOPR ran out, and he was effectively required to use his annual and sick leave. Therefore, the last day for Complainant to timely contact an EEO Counselor was January 7, 2015. Complainant, however, did not contact an EEO Counselor until February 14, 2015.

We have previously accepted complaints raised with an EEO counselor over 45 days after an allegedly discriminatory personnel action as timely, when the complainant can demonstrate that he or she first developed reasonable suspicion within 45 days of the initial contact. Typically, a complainant will establish reasonable suspicion by identifying a similarly situated individual outside his or her protected class (“comparator employee”) who received favorable treatment. See Duplessis v. United States Postal Serv., EEOC Appeal No. 01A52490 (Jun. 15, 2005) (reasonable suspicion did not arise until the complainant returned to work, after being placed in a non-duty/non-pay status for wearing a surgical shoe, and noticed another employee wearing the same shoe on the work room floor); Hill v. Dep't of the Air Force, EEOC Appeal No. 01A62164 (Jun. 26, 2006) (complainant received an alleged discriminatory performance appraisal in February 2004, and was told the rating would not be changed; however, in September 2005, she learned that management changed the evaluations of several co-workers; thus, her October 6, 2005 EEO contact was timely); see also Wes S. v. United States Postal Serv., EEOC Appeal No. 0120161214 (Feb. 17, 2017); Lampi v. Dep't of Transportation, EEOC Appeal No. 01A62261 (Jun. 16, 2006); Blair v. Dep't of Veterans Affairs, EEOC Appeal No. 01A55288 (Dec. 21, 2005); Bingham v. United States Postal Serv., EEOC Appeal No. 01A50221 (Feb. 25, 2005).

According to Complainant, his initial EEO contact was timely based on the date he developed reasonable suspicion, January 31, 2015. He explains that the triggering event for the reasonable suspicion was a conversation with his representative. Complainant also provides a list of employees that he identifies as comparators. However, Complainant does not link his awareness of the comparators, or any other event that would give rise to reasonable suspicion, to the January 31, 2015 conversation.

Contrary to Complainant's appellate argument, the 45-day limitation period provided in our regulations cannot be circumvented by simply offering a later date for when reasonable suspicion arose. Complainant must also explain why the proffered date is "reasonable" by offering enough information for a determination on whether a reasonable person would have suspected discrimination before that date. As Complainant failed to explain why he could not have reasonably suspected discrimination before January 31, 2015, we find his complaint was properly dismissed for untimely contact with an EEO counselor.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is **AFFIRMED**.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal

(FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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

August 13, 2019

Date