



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

[REDACTED]
Elenor S.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Capital Metro Area),
Agency.

Appeal No. 0120181924

Hearing No. 410-2017-00363X

Agency No. 4K-300-0285-16

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 April 27, 2018, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission REVERSES the Agency's final order.

ISSUE PRESENTED

The issue is whether the Administrative Judge properly dismissed Complainant's complaint for untimely contact with an EEO Counselor.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier at the Agency's Lilburn Post Office in Lilburn, Georgia. Complainant contacted an EEO Counselor on or about September 12, 2016, and filed a formal EEO complaint on October 27, 2016, alleging that the Agency discriminated against her on the bases of race (Caucasian), sex (female), color (not specified), and age (46) when:

1. on July 6, 2016, she was placed on emergency placement, in an off-duty status without pay;
2. on July 26, 2016, she was issued a notice of removal; and
3. on July 6 and July 26, 2016, she received disciplinary action which she believed was an attempt to have her resign from her union position and activities.

On November 10, 2016, the Agency informed Complainant that it was accepting claims 1 and 2 for investigation and dismissing claim 3 for failure to state a claim. Report of Investigation (ROI) at 66-71. At the conclusion of the investigation, Complainant was provided a copy of the investigative file, and she requested a hearing before an EEOC Administrative Judge (AJ). On October 3, 2017, the Agency filed a Motion to Dismiss for untimely contact with an EEO Counselor, stating that Complainant contacted the EEO office 48 days after July 26, 2016, the date of the alleged discriminatory incident.

On April 4, 2018, the AJ dismissed Complainant's case for untimely contact with an EEO Counselor. The AJ stated that the alleged discriminatory act occurred on July 26, 2016, and that Complainant did not contact an EEO Counselor until September 12, 2016, which was over 45 days after she received her Notice of Removal. As such, the AJ determined that Complainant's complaint was untimely. The Agency's final action implemented the AJ's decision.

CONTENTIONS ON APPEAL

Complainant filed the instant appeal and submitted a statement in support of her appeal. Through her non-attorney representative, Complainant argues that her contact with the EEO office was timely. Complainant contends that the Agency processed her EEO contact on September 12, 2016, but that she called the Agency's toll-free number to initiate the complaint no later than September 9, 2016, which was within the 45-day deadline. Additionally, Complainant argues that the "clock" started on August 26, 2016, which was the effective date of her removal.

The Agency did not respond to Complainant's appeal. On July 11, 2018, Complainant filed another statement requesting that the Commission consider any Agency brief to be untimely.²

² We note that the Agency did not file an opposition brief; as such, Complainant's request is moot.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

As an initial matter, we note that the Commission has the discretion to review only those issues specifically raised in an appeal. See id. at Chap. 9, § IV.A.3. Because Complainant only challenged the dismissal of claim 2, we will not address claims 1 or 3 in this decision.

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of an EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. In this case, the Agency issued Complainant a Notice of Removal on July 26, 2016, and informed Complainant that her removal would be "effective at the close of business on August 26, 2016, or no sooner than thirty (30) calendar days from the date of receipt of the notice." ROI at 388-90. Complainant's deadline to contact the EEO office was October 10, 2016, which was 45 days after the effective date of her removal, August 26, 2016. While there is a dispute about when Complainant initially contacted the EEO office, even if Complainant contacted the EEO office on September 12, 2016, Complainant's contact for her removal claim was still timely. Accordingly, we find that the AJ improperly dismissed Complainant's removal claim for untimely contact with an EEO Counselor.

CONCLUSION

We find that Complainant's contact with the EEO office for her removal claim was timely, and that the AJ improperly dismissed Complainant's complaint.

Therefore, after a careful review of the record, including Complainant's arguments on appeal, 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 to the Hearings Unit of the EEOC Atlanta District Office a request for a hearing, as well as a copy of the complaint file, within fifteen (15) calendar days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the hearing request and complaint file have been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on Complainant's removal claim, or issue a decision without a hearing, 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 CFR § 1614.503(f) for enforcement by that agency.

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 (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

September 4, 2019

Date