



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

[REDACTED]
Ashlee P.,¹
Complainant,

v.

Nancy A. Berryhill,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 0720180016

Hearing No. 480-2015-00174X

Agency No. SF-14-0047

DISMISSAL OF APPEAL

On December 11, 2017, an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ), following a two-day hearing, issued a decision finding that the Agency violated Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Agency subsequently filed an appeal with the Commission, which the Agency admits was untimely filed. For the following reasons, the Commission DISMISSES the Agency's appeal as untimely.

On December 27, 2013, Complainant filed an EEO complaint, which she subsequently amended, alleging that she was subjected to discrimination based on sex (female and pregnancy) and prior protected EEO activity (contacting an EEO Counselor to initiate the instant complaint) when she was not selected for a promotion, when she was given an unjustifiable performance review, and when her supervisor (S1) cautioned her about filing an EEO complaint. Complainant timely requested a hearing before an AJ, who held a hearing on the merits June 5, 2017, and held a hearing on damages September 1, 2017.

On December 11, 2017, the AJ issued a Decision and Order Entering Judgment, finding that Complainant established that she was subjected to per se reprisal when she was cautioned about filing an EEO complaint and that she was subjected to discrimination based on reprisal when she

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.

was issued an unjustified performance evaluation. As relief, the AJ ordered the Agency to post a notice, to provide S1 with training, to consider taking appropriate disciplinary action against S1, to pay Complainant \$22,500 in nonpecuniary compensatory damages, to calculate the appropriate amount of back pay and other benefits to which Complainant was entitled between February 2016 and August 2016,² and to pay Complainant \$100,817.44 in attorney's fees and costs. The AJ also ordered the Agency to pay any interest required under 5 C.F.R. § 550.806.

The AJ's certificate of service informed the parties that the Commission presumed receipt within five (5) calendar days. Service was made on the Office of Civil Rights and Equal Opportunity (OCREO) at the Agency's headquarters in Baltimore, Maryland at the address designated by the Agency. The AJ also emailed copies of the decision to the Agency representatives on December 11, 2017. In the AJ's Notice to the Parties accompanying his Order Entering Judgment, the AJ informed the Agency of the 40-day time limitation period for issuance of an Agency final order. The AJ also informed the Agency in the Notice to the Parties that if its final action did not fully implement the AJ's decision, the Agency had to simultaneously file an appeal with the Commission's Office of Federal Operations (OFO). The parties were provided with addresses where an appeal had to be filed.

On January 19, 2018, the Agency issued a final order rejecting the AJ's decision and an accompanying appeal. However, the Agency sent a copy of its final order and notice of appeal to the AJ instead of to the Office of Federal Operations. The Agency stated that it was a "good faith" mistake and that "due to restructuring within the component, the individuals responsible for processing the appeals and final orders were unfamiliar with the OFO appeals process." Agency's February 5, 2018, Motion for Leave to File an Untimely Notice of Appeal at 2. On January 30, 2018, the Agency sent a copy of its final order and appeal to the OFO. In its February 5, 2018, Motion for Leave to File an Untimely Notice of Appeal with the Commission, the Agency represented that its OCREO received the AJ's decision on December 31, 2017.

The Commission's regulations call for an agency to take final action on an AJ's decision within 40 days of its receipt, 29 C.F.R. § 1614.110(a). If the agency fails to act or does so beyond the allotted time period, the AJ's decision "shall become the final action of the agency." 29 C.F.R. § 1614.109(i). In this matter, following our regulations, the Agency was required to take action on the AJ's decision on or before 45 days from its issuance (including the five days for mailing), or, in this case, on or before January 25, 2018.³

² Although the AJ did not find that Complainant established that she was subjected to discrimination based on sex when she was not promoted in 2013, the AJ found that Complainant's performance evaluation delayed her promotion to GS-11 from February 2016 to August 2016.

³ The Agency's February 5, 2018, Motion erroneously calculated the 40-day period as commencing when the AJ issued the decision and order entering judgment. The Agency has 40 days from receipt of the AJ's decision and the hearing file to issue a final order. See 29 C.F.R. § 1614.110(a).

Other than its mere assertion that OCREO received the AJ's decision on December 31, 2017, the Agency did not provide an explanation with supporting evidence to show that it did not receive the AJ's decision within the presumed five days, nor did the Agency seek waiver, estoppel, or equitable tolling pursuant to 29 C.F.R. § 1614.604(c). See Reynolds v. Department of Veterans Affairs, EEOC Appeal No. 0720070082 (Jan. 14, 2009) (finding that an agency's unsupported assertion that it received an AJ's decision more than five days from issuance was insufficient to overcome the presumption that the decision was received within five calendar days).

Furthermore, the Agency knew when and where to file its appeal and failed to do so. It has not offered adequate justification for an extension of the applicable time limit for filing its appeal beyond the requisite 40 days. See Selene M. v. Tennessee Valley Authority, EEOC Appeal No. 0720150024 (Oct. 18, 2016) (dismissing as untimely appeal "inadvertently" not sent to OFO until 13 days after 40-day period); Complainant v. Dep't of Transportation, EEOC Appeal No. 0720130032 (Apr. 18, 2014) (appeal untimely where agency mailed notice of appeal and final order to the administrative judge within 40 days but to OFO beyond 40 days); Washington v. Dep't of the Treasury, EEOC Appeal No. 07A40044 (Nov. 15, 2005) (untimely appeal where agency issued a final order, Commission not listed as a recipient of agency's final order, and final order not filed with Commission within requisite 40 days); Bledsoe v. U.S. Postal Serv., EEOC Appeal No. 07A30070 (Apr. 29, 2004) (agency appeal untimely where agency mailed its appeal to a Commission district office within 40 days but not to OFO until omission discovered after over 40 days had passed).

Because of the Agency's failure to take action in a timely manner, we find that the Agency's final order and companion appeal were untimely and that the AJ's decision became the final action of the Agency at the expiration of the 40-day time limit to file an appeal.

CONCLUSION

Accordingly, the Agency's January 30, 2018, appeal is hereby dismissed. See 29 C.F.R. § 1614.403(c). The Agency is ORDERED to comply with the Commission's ORDER below.

ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following remedial actions within one hundred and twenty (120) days of the date this decision is issued, unless otherwise specified:

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall calculate the amount of back pay, with interest, and other benefits to which Complainant is entitled from February 2016 to August 2016, including any applicable step increases, pursuant to 29 C.F.R. § 1614.501. Complainant must cooperate in the Agency's efforts to compute the amount of back pay and benefits and shall provide all relevant information requested by the Agency. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum.

2. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated. The Agency shall provide to Complainant a clear and detailed plain language explanation of its back pay calculations, including the calculation of all benefits provided to Complainant. The Agency shall also provide documentation supporting its calculations and information concerning who prepared the computations and any relevant Agency policy or Office of Personnel Management guidelines. The Agency shall provide Complainant with a reasonable opportunity to respond to its back pay and other calculations. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall pay Complainant \$22,500 in nonpecuniary compensatory damages.
4. The Agency shall pay Complainant \$100,817.44 in attorney's fees and costs.
5. The Agency shall provide a minimum of eight hours of in-person or interactive EEO training, with a special emphasis on reprisal, to the responsible management officials, including S1.
6. The Agency shall consider discipline against the responsible management officials, including S1, and report its decision. If the Agency decides not to take disciplinary action, it shall state the reason(s) for its decision. The Commission does not consider training to constitute a disciplinary action.
7. Within thirty (30) days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include evidence that the ordered corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Los Angeles, California Teleservice Center and West Covina, California facilities copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted.

The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

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)

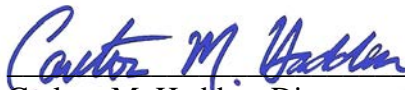
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

December 11, 2018

Date