



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

[REDACTED]
Afton C.,¹
Complainant,

v.

Kirstjen M. Nielsen,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2019001381

Agency No. HS-CBP-01454-2018

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated November 2, 2018, dismissing a formal 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked as a Mission Support Specialist assigned to the San Juan Field Office in San Juan, Puerto Rico.

On March 30, 2018, Complainant initiated contact with an EEO Counselor. Informal efforts to resolve her concerns were not successful.

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 May 10, 2018, Complainant filed a formal complaint, claiming that the Agency subjected her to discrimination based on race, sex, and age, when:

1. On December 30, 2017, her request for permanent reassignment was denied.
2. On February 20, 2018, her travel vouchers were not fully reimbursed.²
3. On March 8, 2018, Assistant Director Mission Support (ADMS) embarrassed her during muster when he told her to find a laundromat.
4. On April 18, 2018, she was placed on leave restriction.
5. On April 18, 2018, her duty hours were changed from 9:00 a.m. to 5:30 p.m., Monday to Friday, to 8:00 a.m. to 4:30 p.m., Monday to Friday.
6. On April 23, 2018, her time and attendance for pay period 7, 2018 was changed from Leave Without Pay (LWOP) “code 71” to Absent Without Leave (AWOL) “code 72”.
7. On April 26, 2018, her Time and Attendance was returned to her for corrections and her leave for pay period 7 was changed back to LWOP.

Thereafter, in correspondence dated July 30, 2018, the EEO Investigator sought clarification from Complainant. Specifically, the Investigator asked for a reason why Complainant did not seek EEO counseling within forty-five days of claim (1), and why claims (6) and (7) were not raised with the EEO Counselor. The Investigator also requested additional details regarding the uncounseled claims, including how Complainant was aggrieved by the events.

In response, Complainant explained that claim (1) “was not the actual complaint” but rather, “just one of the allegations to support my actual claim.” According to Complainant she made timely contact, within forty-five days of February 20, 2018, the date she learned that her travel voucher was not fully reimbursed. Specifically, Complainant was reimbursed as an Evacuee rather than on TDY, and that parties on TDY are reimbursed for 100% of their lodging and per diem for the entirety of their TDY, while Evacuees only received 100% for the first 30 days, and 60% thereafter. Regarding claims (6) and (7), Complainant stated they were not raised with the Counselor because they occurred at the time her Notice of Right to File was sent to her.

² Specifically, Complainant was reimbursed as an “Evacuee” rather than on “TDY.” The record reflects that parties on TDY are reimbursed for 100% of their lodging and per diem for the entirety of their TDY, while Evacuees receive 100% reimbursement only for the first 30 days, and 60% thereafter.

On August 15, 2018, Complainant executed a “Partial Withdrawal of Complaint”. Therein, Complainant withdrew claims (1), (3), (4), (5), (6) and (7). In an email from that day, the EEO Investigator stated: “As per our conversation this morning and your written clarification response, I understand that you only wish to raise the issue of [claim (2)].” Further, noted the Investigator, “the other six items . . . were provided for *supporting information only*.”

The Investigator sought additional information from Complainant regarding the issue of the timeliness of EEO Counselor contact regarding claim (2), in correspondence dated August 27, 2018. Observing that Complainant contacted the EEO Counselor on March 30, 2018, regarding her purported inadequate reimbursement on February 20, 2018, the Investigator noted that Complainant had been notified in an October 27, 2017 email that she was in Miami on Evacuee Status. Complainant acknowledged such status in October 31, 2017.

In response, Complainant acknowledged that she first learned she was changed from TDY to Evacuee status on October 31, 2017. However, she reiterated that she did not learn her travel to Miami would not be fully reimbursed until February 28, 2018, when her final voucher was paid. According to Complainant, she had submitted her travel vouchers with her actual expenses. After receiving the final payment, she obtained a copy of her voucher and “realized that the figures were altered before being sent to NFC for processing.”

In its November 10, 2018, decision, the Agency dismissed the formal complaint, now comprised solely of claim (2), for untimely EEO Counselor contact. The Agency reasoned that from October 31, 2017 to February 21, 2018, “she was attempting to resolve her travel status from evacuee to TDY status,” but that such actions did not preclude her from initiating the EEO process when she learned of the decision to place her on evacuee status on October 31, 2017. Additionally, the Agency noted that Complainant was aware of the forty-five day time limitation for contacting an EEO Counselor.

Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

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 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. 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. 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.

EEOC Regulations provide that the agency or the Commission shall extend the time limits when the individual shows that she was not notified of the time limits and was not otherwise aware of them, that she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence she was prevented by circumstances beyond her control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

Here, Complainant is alleging the amount of her travel reimbursement was discriminatory. This discrete act, following the submission and processing of her travel voucher, occurred on February 29, 2018. While the record reflects, and Complainant acknowledges, that she was told by her superior that she would be on Evacuee status in late October 2017, the decision regarding the amount to reimburse her was not issued until February 2018. Therefore, we find that Complainant's EEO Counselor contact was timely.

Finally, in response to Complainant's appeal, the Agency not only reiterates the reasoning for its dismissal, but also addresses the merits of the complaint. The Agency presents legitimate, non-discriminatory reasons for its actions. Such analysis is premature and inappropriate, as Complainant has not had the benefit of a complete investigation into her claim as required by EEOC regulations. See Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991).

CONCLUSION

The Agency's decision to dismiss the formal complaint is **REVERSED**. The formal complaint is **REMANDED** to the Agency in accordance with the **ORDER** below.

ORDER (E1016)

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.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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)

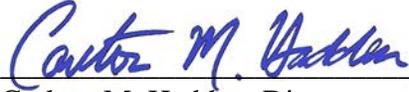
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

March 13, 2019

Date