

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
Washington, DC 20013

Joseph De Yore, Complainant,
v.
Department of Justice, (Federal Bureau of Prisons), Agency

Appeal No. 0120101223
Agency No. P20090795

July 20, 2010

DECISION

Complainant filed a timely appeal with this Commission from the Agency's final decision, dated January 8, 2010, dismissing his 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. The Commission accepts the appeal in accordance with 29 C.F.R. 1614.405.

BACKGROUND

On September 2, 2009, Complainant contacted the EEO office regarding claims of discrimination based on his race and in reprisal for prior EEO activity. Informal efforts to resolve Complainant's concerns were unsuccessful. On January 3, 2009, Complainant filed the instant formal complaint.

In its final decision, the Agency framed the claims as follows:

- (1) From May 2006 through June 2008, Complainant was subjected to harassment in the form of unwelcome verbal racial epithets.
- (2) On or about August 12, 2009, Complainant withdrew an application for an Inspector General vacancy announcement after learning that he was the subject of an Office of Internal Affairs (OIA) investigation.
- (3) On August 20, 2009, Complainant was contacted by an Office of Internal Affairs (OIA) Agent and informed that he was the subject of an internal investigation.
- (4) Complainant was dissatisfied with the EEO Counselor's handling of his request for EEO Counseling in September 2009 through October 2009.

In its final decision, the Agency dismissed the formal complaint on the grounds of untimely EEO Counselor contact and failure to state a claim. Regarding claim (1), the Agency found that Complainant's September 2, 2009 EEO Counselor contact was more than a year after the more recent event of alleged harassment. Regarding claim (2), the Agency stated that Complainant voluntarily withdrew his application and therefore he failed to state a claim. As to the internal investigation, claim (3), the Agency concluded that Complainant was improperly using the EEO process to lodge a collateral attack. Finally, the Agency dismissed

claim (4) as a "spin-off" complaint. The Agency noted that complainant's dissatisfaction with the EEO process had been addressed with the EEO Counselor.

CONTENTIONS ON APPEAL

On appeal, Complainant acknowledges that he contacted the EEO office on September 1, 2009. He contends, however, that when the racial epithets were made the Agency assured him that an investigation would be conducted. Complainant also feared reprisal. It was not until the current Warden chose not to discipline the staff member who made the remarks, and instead "wrongly initiated a misconduct case against me", that Complainant was "forced to reconsider EEO." Complainant argues that the time limit should start from August 29, 2009, when he learned of the Warden's actions.

Regarding claim (2), Complainant challenges the Agency's statement that his withdrawal was "voluntary". Complainant argues that he could not risk having a prospective employer learn that he was under investigation for unprofessional conduct, "Withdrawal was the only rational election to mitigate the adverse effect cause by the [Agency's] inappropriate action."

Complainant argues that claim (3) is not a challenge to another forum's proceeding, but rather a claim that the investigation was initiated due to his race. He believes that the investigation itself was fair, but that the Warden acted with discriminatory animus toward his race in initiated the investigation.

With respect to his dissatisfaction with the processing of his complaint, Complainant believes that the Agency's claim to have "addressed these concerns were the EEO Counselor" to be insufficient.

Complainant reiterates his belief that the Warden's actions created a hostile work environment_ Complainant asserts that the Warden has ultimate supervision over Complainant and can therefore control Complainant's daily activities. Complainant argues that by condoning and protecting the harasser, the Warden has aided in creating a hostile environment.

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

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.

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

Here, Complainant contacted the EEO office on September 2, 2009, regarding comments that

were made over a year earlier. Complainant contends that the delay was due to his belief that an internal investigation would be conducted by the Agency. The Commission has consistently held that internal appeals or informal efforts to challenge an Agency's adverse action and/or the filing of a grievance do not toll the running of the time limit to contact an EEO Counselor. See *Hosford v. Department of Veterans Affairs*, EEOC Request No. 05890038 (June 9, 1989); *Miller v. United States Postal Service*, EEOC Request No. 05880835 (February 2, 1989). Therefore, we find that claim (1) was properly dismissed.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an Agency shall dismiss a complaint that fails to state a claim. An Agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that Agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The

Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049 (April 21, 1994).

With respect to claim (2), the Commission agrees that Complainant has failed to show he suffered a personal harm regarding a term, condition or privilege of his employment. Complainant admits that he chose to withdraw his application for the inspector General vacancy.

In claim (3), however, we find that the Agency erred in dismissing the matter for failure to state a claim. The Agency considered claim (3) as an impermissible collateral attack upon the Agency's internal investigation process. However, Complainant clearly expresses that he is not challenging the execution or the results of the investigation, but rather the determination to initiate the investigation. Complainant believes that racial animus motivated the Warden's decision to launch an investigation of him. The Commission finds that Complainant has stated a loss or harm to a term, condition or privilege of his employment

The regulation set forth at 29 C.F.R. § 1614.107(a)(8) provides, in relevant part, that an Agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint.

In claim (4), Complainant takes issue with the EEO counseling provided in the instant complaint. For example, in the formal complaint, Complainant contends that his "Notice of Right to File" was issued fifty-five days after he initiated contact, yet he never agreed to extend the thirty-day counseling period. While Complainant's concerns do not give rise to an actionable claim, the Agency has a duty to address the matter. Specifically, EEOC Management Directive 110 (EEO MD-110), Chapter 5, Section IV(D) (November 9, 1999) provides that: "The agency official responsible for the quality of complaints processing must add a record of the Complainant's concerns and any actions the agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the agency's reason(s) for not taking any action." Here, the Agency simply states in its decision that it "has reviewed [Complainant's] dissatisfaction with the EEO process and has addressed these concerns with the EEO Counselor." The record, however, does not reflect what, if any, actions the Agency took to address Complainant's concerns. Consequently, to remedy this deficiency, and out of concern for the integrity of the Agency's EEO process, we order the Agency to provide Complainant with a report of any actions it took to resolve his concerns regarding the processing of his complaint, or an explanation of its reason for not taking action, in accordance with the order below. See *Losinger v. Department of Agriculture*, EEOC Request No. 0520070870

(September 26, 2007).

CONCLUSION

Accordingly, the Agency's decision to dismiss claims (1) and (2) was proper and is hereby AFFIRMED. The Agency's decision to dismiss claims (3) and (4) is REVERSED. Claims (3) and (4) are remanded to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency is ORDERED to take the following action:

1. Regarding claim (3), the Agency is ordered to process the remanded claim in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to Complainant that it has received claim (3) within thirty (30) calendar days of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and shall notify Complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If 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.

2. Regarding claim (4), within thirty (30) calendar days of the date this decision becomes final, the Agency official responsible for the quality of complaints processing must add a record of Complainant's concerns, and any actions that the Agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. Moreover, the Agency shall provide Complainant with a report of any actions taken by the Agency to resolve the concerns, or an explanation of its reason for not taking action.

A copy of any Agency documentation regarding the matter addressed in point 2 must be sent to the Compliance Officer as referenced below.

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IMPLEMENTATION OF THE COMMISSION'S DECISION

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 submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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

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 or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999), All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 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

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §_2000e e seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

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