



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

John Prochaska,
Complainant,

v.

Ray Mabus,
Secretary,
Department of the Navy,
Agency.

Appeal No. 0120112817

Agency No. 104008300615

DECISION

Complainant filed a timely appeal with this Commission from the Agency's final decision dated May 2, 2011, dismissing a formal complaint of unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Tool Room Mechanic Trainee at the Agency's Naval Facilities Engineering Command Midwest facility in Great Lakes, Illinois. On October 4, 2010, Complainant initiated contact with an EEO Counselor. Informal efforts to resolve his concerns were unsuccessful.

On February 15, 2011, Complainant filed the instant formal complaint, claiming that he was the victim of unlawful employment discrimination on the bases of age and disability.

On April 12, 2011, the Agency informed Complainant that the following claim had been accepted for investigation:

On September 27, 2010, Complainant was given a Notice of Expiration of Term Appointment and was put on administrative leave until his term expired on September 30, 2010.

Thereafter, Complainant's non-attorney representative notified the Agency in a letter dated April 17, 2011, that the Agency incorrectly framed the claim, and presented alternative language, which the Agency accepted in lieu of its own language. Therefore, the Agency determined that Complainant's formal complaint was identified as follows:

on September 27, 2010, Complainant was notified that his position as a Tool Room Mechanic Trainee would not be converted to a permanent position, Tool Room Mechanic, despite his successful completion of the training program in May 2006.

In a decision on May 2, 2011, the Agency dismissed Complainant's allegation for failure to timely contact an EEO Counselor. Although the Agency had previously accepted the formal complaint for investigation as it had defined the matter above, it nevertheless found that dismissal was appropriate given the manner in which Complainant requested that the claim be re-defined. The Agency found that Complainant was only eligible for conversion into a permanent position for a period of 120 days following successful completion of a training program, in May 2006. Therefore, the Agency determined that the alleged discriminatory incident occurred at the end of the 120-day period, in 2006. The Agency concluded that because Complainant contacted an EEO Counselor on October 4, 2010, Complainant raised his claim beyond the forty-five day filing period.

CONTENTIONS ON APPEAL

Complainant, through his representative, argues that he "was never informed that he could not be converted into a permanent position after 120 days from the date of successful completion of the training program . . . in May 2006." Complainant argues that he never received formal notification that he would not be converted into a permanent position until receiving the Notice of Expiration.

In response, the Agency argues that it had originally accepted Complainant's formal complaint because it believed the formal complaint addressed a claim that Complainant's term appointment was not extended. However, upon being notified by Complainant that he determined that the issue was misstated, the Agency determined that the formal complaint focused instead on the completion of the training program, which occurred some four years previously. The Agency cites the EEO Counselor's report, arguing that Complainant was aware his term appointment was not converted in 2006, because he complained about it at the time. Further, the Agency argues Complainant has failed to present any probative evidence showing that the 45-day limitation period should be tolled or waived.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. §1614.107(a)(2) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) calendar days of an alleged discriminatory event, the effective date of an alleged

discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action. The Commission had adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 45-day limitation period is triggered.. See Ball v. USPS, EEOC Request No. 05880247 (July 6, 1989). Thus, the limitations period is not triggered until a complainant should have reasonably suspected discrimination, but before all the facts that would have supported a charge of discrimination had become apparent.

The Commission determines that irrespective of the disparity between the manner in which the Agency originally defined the matter raised in the instant formal complaint, and the claim that was ultimately re-defined by the Agency as requested by Complainant, the essence of the formal complaint remained Complainant's severance from Agency employment in September 2010. The focus on whether or not Complainant indeed was converted to a full-time position in 2006, approximately four years preceding his instant pursuit of the EEO complaint process, obfuscates the actual issue raised: separation from Agency employment in September 2010. As Complainant initiated EEO Counselor contact well within forty-five days of that event, on October 4, 2010, we find the Agency's dismissal of the formal complaint on the grounds of untimely EEO Counselor contact was improper.

The Agency's dismissal of the instant formal complaint is REVERSED. The formal complaint is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER (E0610)

The Agency is ordered to process the remanded claim in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claim **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 also 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 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 (K0610)

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 (M0610)

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 (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 (Z0610)

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 et 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").

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

SEP 21 2011

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

John Prochaska
25151 87th St #4
Salem, WI 53168

Chungsoo J. Lee, EEO 21, LLC
148 E Street Rd #321
Feasterville, PA 19053

William A. Navas Jr., Asst. Secretary, MRA/EEO
(NAVOECMA) OCHR Code 015
Department of the Navy
614 Sicard St., SE #100
Washington Navy Yard, DC 20374-5072

SEP 21 2011

Date



Equal Opportunity Assistant