

OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

Melanie Ingram,)
Appellant)
)
v.)
) Case Number: 14-SN-15 (CV, AG, DA, RP)
Office of the Senate Sergeant at Arms,))
Appellee.)
)
_____))

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by Melanie Ingram (“Ingram”), against the Office of the Senate Sergeant at Arms (“SSA”). Ingram seeks review of the Hearing Officer’s October 10, 2014 Order, which granted the SSA’s motion to dismiss for lack of subject matter jurisdiction. The Hearing Officer found that Ingram’s request for counseling was untimely and that Ingram’s administrative complaint was also untimely.

Upon due consideration of the Hearing Officer’s Order, the parties’ briefs and filings, and the record in these proceedings, the Board affirms the Hearing Officer’s decision to dismiss the complaint because the request for counseling was untimely.

I. Background

Employment History

Ingram began working for the SSA on March 22, 1999. In 2013, she was working as an administrative assistant for the SSA. On February 14, 2013, the SSA issued to all employees a memorandum captioned “SSA Voluntary Separation Incentive Payment (VSIP) Program.” The memorandum discussed financial constraints imposed upon the SSA’s budget, as a result of the March 1, 2013 sequester. The memorandum warned employees of the potential for furlough and/or a Reduction-In-Force (“reduction-in-force” or “RIF”). The memorandum also offered employees the opportunity to voluntarily terminate their employment as part of the VSIP Program, to help improve the SSA’s budget shortfall.

Termination

On May 10, 2013, Ingram alleges that she was working near the SSA Recording Studio Conference Room. She claims that she overheard supervisor D.M., supervisor D.B. and H.R. Administrator E.M., “plotting to remove a female employee through one of several contrived methods, of which a Reduction-in-Force was one of several possibilities.” She also asserts that supervisors D.M. and D.B. stated that they wanted the employee out of the office as soon as possible because they disliked her and considered her a “drag” on the office. Ingram maintains that they discussed placing the employee on a temporary reassignment, removal, or suspension, as well as other possibilities. According to Ingram, the tone of these discussions was “secretive, sinister, and underhanded.” Ingram claims she questioned D.M. about the meeting. She maintains that D.M. allegedly responded, “Don’t worry about it you will find out what is going on soon.”

Later that day on May 10, 2013, the Deputy Assistant Sergeant at Arms and supervisor D.B. met with Ingram. At the meeting, the Deputy Assistant Sergeant at Arms provided Ingram a letter, dated May 10, 2013, which indicated that “[r]egretfully, this letter is your official notification that the position you currently occupy will be eliminated and your employment with the [SSA] will end on May 10, 2013 as part of this reduction in force.” After the meeting, Ingram returned to her work station to clear her desk. She maintains that she discovered an unmarked and unopened envelope that had been placed on the right side of her desk. Ingram claims that she did not open the envelope. She gathered her belongings, including the envelope, and left the office.

Within 15 minutes of Ingram leaving the office, the SSA sent an email to staff announcing that Ingram had been terminated due to a RIF. The email indicated that further reductions might be possible in fiscal year 2014. The record shows that no other employee was subject to a RIF.

The SSA sent a letter, dated May 13, 2013, to the Financial Clerk of the Senate. The letter advised that Ingram should be terminated from the payroll, effective July 16, 2013.

On May 15, 2013, Ingram met with then Senate Sergeant at Arms Terrance Gainer (“Gainer”) to discuss the loss of her position in the RIF process. Gainer indicated that Ingram was still employed by the SSA until July 16, 2013. Gainer encouraged Ingram to apply and accept another position with the SSA. Gainer later wrote a letter of support for Ingram, dated May 22, 2013. Ingram claims that she applied for positions with the SSA in May, June, and July, but was unsuccessful.

By late August 2013, Ingram maintains that she started to believe her separation was discriminatory and was conducted through inappropriate use of a RIF. She believes that the SSA did not properly follow the regulatory scheme for RIFs as set forth in the Code of Federal Regulations. She asserts that her belief that the RIF was improper was also based on Gainer’s facial expressions when she told him that she was the only person to lose her job, despite her

superior seniority. Ingram maintains that all of these factors prompted Ingram to open the envelope from her desk that she discovered on May 10, 2013. The envelope contained emails from her supervisors and coworkers that were highly derogatory towards Ingram and her status in the office. Ingram claims that these emails enabled her to link the earlier May 10, 2014 Recording Studio Conference Room conversation she overheard to her termination.

Procedural Background

Ingram obtained private counsel on December 5, 2013. On January 10, 2014, Ingram filed a request for counseling with the Office of Compliance (“OOC”). Mediation began on March 4, 2014, and ended with no settlement on or about May 2, 2014.

On April 20, 2014, Ingram alleges that she suffered a domestic assault by her then boyfriend. She alleges that the assault caused her to be “confused, disorientated and feeling lost.” She further alleges that the assault adversely affected her ability to timely file her administrative complaint with the OOC.

Also, the OOC sent Ingram’s former counsel the end of mediation notice on May 8, 2014. Ingram maintains that she did not become aware of the end of mediation notice until May 12, 2014, when she received it via email from her former counsel. She faults her former counsel and the OOC for not sending her the end of mediation notice sooner. She later retained a second counsel.

Ingram asserts, due to the exigent reasons described above, she was “forced” to fax her administrative complaint to the OOC on August 7, 2014, which she admits was one day late. Ingram’s administrative complaint alleged, among other things, that the SSA had engaged in an ongoing pattern and practice of discrimination and hostile work environment harassment toward Ingram on the basis of her race, disability, and prior EEO activities. She requested a special exemption to excuse her late filing “due to my most recent extenuating circumstances of being a victim of Domestic Violence Assault.” She added that her related medications: “[c]aused me to feel confused, numb, to experience memory loss and disorientation with day to day activities. As a consequence of the symptoms and medications, I was one day late in filing my complaint with the [OOC].” Ingram provided a letter from her therapist, which claims that Ingram was unable to timely file her administrative complaint as a result of her mental state.

On August 22, 2014, the SSA filed a motion to dismiss Ingram’s case. The SSA argued that Ingram’s case should be dismissed because Ingram’s request for counseling and administrative complaint filing was both untimely. Ingram filed an opposition and the SSA filed a reply. On October 10, 2014, the Hearing Officer granted the SSA’s motion to dismiss on the basis that the request for counseling and administrative complaint were both untimely filed.

II. Hearing Officer's Decisions and Orders

The Hearing Officer determined that, as a result of *Delaware State College v. Ricks*, 449 U.S. 250 (1980), Ingram initiated formal counseling with the OCC more than 180 days after the alleged discriminatory act of her termination. The Hearing Officer reasoned that Ingram was informed of the final decision to fire her, under a RIF, on May 10, 2013. Although Ingram's termination was not effective until July 16, 2013, the Hearing Officer found that the 180 day filing period began to run when Ingram was informed she was terminated on May 10, 2013. According to the Hearing Officer, the 180 day filing period expired on November 6, 2013. Yet, Ingram did not file her request for counseling until January 13, 2014 – more than 180 days after the deadline. The Hearing Officer found that Ingram's request for counseling was untimely.

Next, the Hearing Officer, assuming, “arguendo,” that Ingram timely initiated counseling, addressed the SSA's claim that the complaint should also be dismissed because Ingram admitted that she filed her complaint one day late.

The Hearing Officer stated he was sympathetic to Ingram's explanations that her former counsels delayed for several days in providing her with the end of mediation notice and that she was dealing with the traumatic effects of suffering a domestic assault. The Hearing Officer, however, stated that he could not conclude that those explanations provided a legally sufficient excuse for Ingram's late filings.

The Hearing Officer found that Ingram received the end of mediation notice on May 12, 2014, which allowed Ingram until August 6, 2014 to file a complaint. The Hearing Officer noted that the domestic assault that allegedly incapacitated Ingram occurred on April 20, 2014. The Hearing Officer acknowledged that the therapist's declaration was provided, but determined that the therapist's credentials were unidentified. Also, the Hearing Officer stated that Ingram presented no evidence that Ingram was unable to provide for her daily needs, or that she required any type of extraordinary assistance, or that she was incapable of handling her financial affairs before she was required to file her administrative complaint. The Hearing Officer noted that Ingram was able to file a detailed complaint on August 7, 2014, despite the effects of the April 20, 2014 domestic assault. Therefore, the Hearing Officer stated that he found no basis for tolling the complaint filing period and also dismissed the complaint as untimely, due to the late filing of the administrative complaint.

III. Standard of Review

The Board's standard of review for appeals from a Hearing Officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c). *Katsouros v. Office*

of the Architect of the Capitol, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

IV. Analysis

Request for Counseling

The Hearing Officer's finding that the request for counseling is untimely is affirmed. Dismissal under Section 5.03(a) and (b) of the OOC Procedural Rules is appropriate where an affirmative defense or other bar to relief, such as the statute of limitations or a failure to exhaust administrative remedies, is apparent on the face of the complaint. *See Britton v. Office of Architect of the Capitol*, Case No. 02-AC-20 (CV, RP) (May 23, 2005) (dismissing FMLA claim for failure to timely exhaust as apparent from claimant's allegations and administrative record). Under the CAA, a request for counseling must be filed with the OOC within 180 days of the alleged adverse employment action. *See Patterson v. Architect of the Capitol*, 08-AC-48 (RP) (June 23, 2010) (the CAA requires that a request for counseling be filed no later than 180 days after the date of the alleged violation).

The Supreme Court has held, for the purposes of Title VII, that an adverse employment action occurs, and the filing period limitation of the statute begins to run, on the date a person is notified of an employment decision. *Ricks*, 449 U.S. at 258 ("the only alleged discrimination occurred--and the filing limitations periods therefore commenced--at the time the tenure decision was made and communicated to the [employee].").

Thus, the 180 day limitations period begins to run when the claimant is advised of the adverse employment action and not when the consequences of that action occur. *Ricks*, 449 U.S. at 258 ("the only alleged discrimination occurred-and the filing limitations periods therefore commenced-at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure-the eventual loss of a teaching position-did not occur until later.").

Ingram maintains that the continuing violation theory allows her to pursue her claims because she allegedly has endured an ongoing pattern and practice of discrimination after May 10, 2013, which distinguishes her facts from the facts in *Ricks*, 449 U.S. at 250. However, there is no evidence to suggest that Ingram was harassed and subject to a hostile work environment after she was notified of her discharge on May 10, 2013. Ingram immediately stopped working for the SSA after learning of her firing on May 10, 2013. While she met with Gainer and may have applied for some positions at the SSA after she was notified of her termination, the facts do not suggest that Ingram was harassed by any SSA employees after May 10, 2013 because she was no longer physically in the office. *See West v. Potter*, 540 F.Supp.2d 91, 96 (D.D.C. 2008) (events

occurring after employee's last day on the job cannot support timely hostile work environment when she was not present).

Furthermore, the continuing violation theory does not apply to discrete acts such as the post May 10, 2013 failures to hire, which Ingram attempts to rely on to show that her request for counseling is timely. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (continuing violation theory does not apply to discrete acts of discrimination). Also, Ingram has not shown that she sought counseling on the failures to hire, which would have required her to seek counseling on the denials at least 180 days from the date that they occurred. *See Patterson v. Architect of the Capitol*, Case No. 08-AC-48 (RP) (June 23, 2010) (the CAA requires that a request for counseling be filed no later than 180 days after the date of the alleged violation). Therefore, Ingram cannot rely on these denials because they were never properly before the Hearing Officer.

Here, the SSA informed Ingram on May 10, 2013 that she was terminated. While July 16, 2013 was the effective date of her discharge, May 10, 2013 is the date of her adverse employment action that starts the 180-day deadline to file the request for counseling. As a result, Ingram had until November 6, 2013 to file her request for counseling to make it timely. *Ricks*, 449 U.S. at 259 (with respect to a Title VII claim, the limitations period began to run when the decision was made and the employee was notified of the decision). Ingram did not file her request for counseling until January 13, 2014, which makes her request for counseling untimely. The dismissal of Ingram's case due to her untimely request for counseling is hereby affirmed.¹

ORDER

For the foregoing reasons, the Board affirms Hearing Officer's decision to dismiss the complaint.

It is so ORDERED.

Issued, Washington, DC July 22, 2015.

¹ Ingram's case was properly dismissed because her request for counseling was untimely. Therefore, we need not review the Hearing Officer's finding on the untimeliness of the administrative complaint. *See Perez v. Office of Rep. Sheila Jackson-Lee*, Case No. 04-HS-21 (CV, RP), at *11 (June 29, 2005) ("[t]he Hearing Officer concluded that the facts in this case did not satisfy the standard for tolling the limitation period either in the late filing of the request for counseling or the late filing of the administrative Complaint. Because we agree with the Hearing Officer's conclusion regarding the late filing of the request for counseling, we do not need to address his finding regarding the late filing of the Complaint."). As a result, the Board takes no position on the dismissal of Ingram's case due to the untimeliness of the filing of the administrative complaint.