



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN 3046-AA97

Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission (“EEOC” or “Commission”) is proposing a revision to its federal sector complaint processing regulations in order to bring them into compliance with a federal circuit court decision concerning whether and when a complainant may file a civil action after having previously filed an administrative appeal or request for reconsideration with the EEOC. The EEOC also proposes making certain editorial changes.

DATES: Comments on the Notice of Proposed Rulemaking (hereinafter “NPRM”) must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by RIN Number 3046-AA97, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (202) 663-4114. (There is no toll free FAX number). Only comments of six or fewer pages will be accepted via FAX transmittal, in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the

sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663-4070 (voice) or (202) 663-4074 (TTY). (These are not toll free numbers).

- Mail: Bernadette B. Wilson, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.
- Hand Delivery / Courier: Bernadette B. Wilson, Executive Officer, Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

Instructions: The Commission invites comments from all interested parties. All comment submissions must include the agency name and docket number or the Regulatory Information Number (RIN) for this rulemaking. Comments need be submitted in only one of the above-listed formats. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information you provide.

Docket: For access to comments received, go to <http://www.regulations.gov>. Copies of the received comments also will be available for review at the Commission's library, 131 M Street, NE, Suite 4NW08R, Washington, DC 20507, between the hours of 9:30 a.m. and 5:00 p.m., from **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]** until the Commission publishes the rule in final form but you must make an appointment to do so with library staff.

FOR FURTHER INFORMATION CONTACT: Kathleen Oram, Assistant Legal Counsel, (202) 663-4681, or Gary J. Hozempa, Senior Staff Attorney, (202) 663-4666, or 1-800-669-6820 (TTY), Office of Legal Counsel, U.S. Equal Employment Opportunity Commission. (The first two telephone numbers are not toll free numbers). Requests for this document in an

alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663-4900 (voice) or (202) 663-4494 (TTY).

SUPPLEMENTARY INFORMATION: As set forth under the current federal sector EEO complaint system (29 CFR part 1614), an individual complainant, or a class agent or claimant, who has filed an administrative complaint alleging a violation of section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16 (hereinafter “Title VII”); section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a (hereinafter “ADEA”); section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 (hereinafter “Rehabilitation Act”); or section 202 of Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff (hereinafter “GINA”), may file a civil action within 90 days of receipt of final agency action unless the complainant has filed an appeal with the EEOC. See 29 CFR 1614.407(a). When an appeal is filed with the EEOC, the current rules state that the complainant must wait to file a civil action until one of two events occurs: the EEOC issues a final decision on the appeal; or 180 days have passed since the filing of the appeal and the EEOC has not issued a decision within that time period. See 29 CFR 1614.407(c) & (d) (a complainant may file a civil action “[w]ithin 90 days of receipt of the Commission’s final decision on an appeal[] or . . . [a]fter 180 days from the date of filing an appeal . . . if there has been no final decision by the Commission.”).

In 2012, the Ninth Circuit held that a literal application of 29 CFR 1614.407(d) is not warranted in all circumstances. In Bullock v. Berrien, 688 F.3d 613 (9th Cir. 2012), a federal employee (hereinafter referred to as “complainant”) filed an administrative EEO complaint against her employing agency and subsequently filed an administrative appeal with the EEOC regarding the agency’s final action on her complaint. Shortly thereafter, the complainant

withdrew the appeal and filed a civil action. The lawsuit was filed within the 90-day period following her receipt of the agency's final action.

The district court dismissed the civil action, finding that the complainant had failed to exhaust her administrative remedies. Relying on 29 CFR 1614.407(d), the district court concluded that the complainant's appeal to EEOC "triggered the mandatory 180-day waiting period before Plaintiff was permitted to file with this Court." Bullock v. Dominguez, 2010 WL 1734964, at *3 (S.D. Cal. April 27, 2010). The district court stated that the plaintiff's "abandoned appeal would still trigger the 180-day rule, and her suit in this court was therefore premature." Id. (citations omitted).

On appeal, the Ninth Circuit reversed. The court reasoned that, because a federal sector complainant can file a civil action within 90 days of receipt of the agency final action and is not required to file an appeal before going to court, an appeal to the EEOC is an optional rather than a required administrative step. The court concluded, therefore, that a federal employee can withdraw an optional appeal and file a civil action within the 90-day period following receipt of the agency final action. See Bullock, 688 F.3d at 618-19. The court noted that it had "no occasion to decide whether an employee's lawsuit could proceed if the employee prematurely withdrew from an administrative appeal and filed suit more than 90 days after receiving notice of the final agency action on her complaint." Id. at 619 (citations omitted).

In light of the Ninth Circuit's decision, the EEOC believes its regulations regarding a complainant's right to file a civil action should be revised to recognize that filing an administrative appeal or a request for reconsideration is an optional administrative step, and that an administrative appeal or a request for reconsideration may be withdrawn without affecting the complainant's right to file a civil action.

In an initial draft of this NPRM that, pursuant to Executive Order 12067, the EEOC sent to federal agencies for coordination, the EEOC proposed to eliminate from 1614.407(a) and (b) language stating that a complainant may not go to court if an administrative appeal has been filed. The EEOC also proposed adding a paragraph (e) to 1614.407, stating that a complainant who has filed an appeal can withdraw it and proceed to court so long as the EEOC has not issued a final decision on the appeal.

Thirteen agencies submitted comments. Three agencies concurred, but ten others opposed the proposed changes, particularly with respect to proposed 1614.407(e). The opposing agencies generally argued that the draft NPRM appeared to allow a complainant to withdraw an appeal and go to court even after 90 days of receipt of an agency final action, thereby purportedly establishing a right to file a civil action that does not exist in § 717(c) of Title VII.

It is the intent of the Commission to make clear that, as held in Bullock, an appeal to the EEOC is an optional rather than a required administrative step, and that administrative exhaustion can occur when an agency either takes final action on a complaint or fails to take final action on a complaint within 180 days of the date the complaint is filed.¹ The Commission can achieve this result through its proposed revisions to paragraphs (a) and (b) of 1614.407 (*i.e.*,

¹ While the EEOC agrees with the Ninth Circuit's holding that an appeal to the EEOC of a final agency action is not required for exhaustion of administrative remedies, the EEOC disagrees with any suggestion that "adjudication by an ALJ" is required for exhaustion. See Bullock, 688 F.3d at 618 ("[W]e hold that an aggrieved employee subject to the procedural rules of Title VII exhausts her administrative remedies by filing a formal complaint for adjudication by an ALJ."). The Ninth Circuit misstated the complaint processing steps set forth in 29 CFR part 1614. After filing a complaint, a complainant may request a hearing or an immediate final agency decision. The hearing is therefore optional and is held before an EEOC-employed Administrative Judge (AJ) (not an Administrative Law Judge appointed under 5 U.S.C. 3105). See 29 CFR 1614.108(f) ("the complainant has the right to request a hearing and decision from an administrative judge or may request an immediate final decision . . . from the agency with which the complaint was filed"); 1614.108(h) ("the complainant may request a hearing . . ."); 1614.109(a) ("When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section."); 1614.110 ("[w]hen an agency . . . receives a request for an immediate final decision . . ."). Thus, exhaustion occurs 180 days after the filing of the complaint, regardless of whether the complainant requests or receives a hearing. See 29 CFR 1614.108(g) ("If the agency . . . has been unable to complete its investigation within the time limits required by § 1614.108(f) [usually 180 days after the complaint is filed], . . . the complainant . . . may . . . file a civil action in an appropriate United States District Court . . .").

deleting the words “if no appeal has been filed” from current paragraph (a), and “if an appeal has not been filed” from current paragraph (b)). Additionally, section 717(c) of Title VII, 42 U.S.C. 2000e-16(c), provides that a complainant who wants to file a civil action after receiving notice of an agency’s final action must do so within 90 days. Thus, we agree that proposed 1614.407(e) should be revised to clarify that a complainant who has filed an appeal can withdraw it and proceed to court so long as the complainant does so within 90 days of receipt of an agency final action.

Relatedly, after receiving an appellate decision from the Commission, “[a] party may request reconsideration within 30 days of receipt of a decision of the Commission. . . .” *See* 29 CFR 1614.405(c). If a request for reconsideration is filed, the appellate decision on which it is based is not deemed final for purposes of triggering the right to file a civil action contained in 29 CFR 1614.407(c). *See* 29 CFR 1614.405(c) (“A decision issued [on appeal] is final within the meaning of § 1614.407 unless a timely request for reconsideration is filed by a party to the case.”). Instead, the Commission decision issued in response to the request for reconsideration constitutes the EEOC’s final decision for purposes of invoking the 90-day time period in which a complainant may file a civil action. *See* 29 CFR 1614.407(c) (a complainant may file a civil action “[w]ithin 90 days of receipt of the Commission’s final decision . . .”). For purposes of consistency, the Commission also proposes to add a paragraph (f) to current § 1614.407 in order to address requests for reconsideration.

In conjunction with the proposed revision to 29 CFR 1614.407, the EEOC is proposing to remove 29 CFR 1614.201(c). This paragraph currently sets forth the conditions under which a complainant who has filed a non-mixed case complaint alleging age discrimination is deemed to have exhausted administrative remedies and can file a civil action. Exhaustion requirements for

complaints filed under the ADEA (as well as complaints filed under Title VII, the Rehabilitation Act, and GINA) also are set forth in § 1614.407. Some, but not all, of the exhaustion requirements under paragraph 1614.201(c) are the same as those under § 1614.407. To the extent the exhaustion requirements differ, those listed in § 1614.407, as amended by this proposed rule, are the correct ones. Therefore, the EEOC proposes to eliminate paragraph 1614.201(c).

The unique alternative exhaustion requirement that solely pertains to complaints filed under the ADEA – that a complainant may file a civil action thirty days after giving EEOC notice of the intent to file the civil action – is retained in current paragraph 1614.201(a). Similarly, the exhaustion requirements applicable to all mixed-case complaints, including those filed under the ADEA (as well as Title VII, the Rehabilitation Act, and GINA), as set forth in § 1614.310, are retained. Thus, the proposed elimination of paragraph 1614.201(c) will not affect the rights of a complainant who files an ADEA complaint, whether as a mixed or non-mixed complaint.

One agency suggested that the EEOC include a provision requiring a complainant to notify the relevant agency when the complainant withdraws an appeal filed with OFO. While this suggestion has merit, the EEOC's concern is with the enforceability of the suggested rule. Nevertheless, the EEOC proposes revising 29 CFR 1614.409 to indicate that the EEOC will not be able to enforce an appellate decision that is issued after a complainant has filed a civil action, and that a complainant should notify the EEOC when he or she files a civil action while an appeal is pending.

Finally, the EEOC proposes making an editorial change to 29 CFR 1614.505(a)(4) (“Interim relief”). Currently, that paragraph contains an erroneous reference to § 1614.505(b)(2).

There is no paragraph (b)(2) within § 1614.505. Instead, the proper reference should be to paragraph (a)(3) of § 1614.505. Thus, the Commission proposes making this change.

Regulatory Procedures

Executive Order 12866

The Commission has complied with the principles in section 1(b) of Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a “significant regulatory action” under section 3(f) of the Order, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order.

Executive Order 13771

This proposed rule is not subject to Executive Order 13771, Reducing Regulation and Controlling Regulatory Cost. Pursuant to guidance issued by the Office of Management and Budget’s Office of Information and Regulatory Affairs (April 5, 2017), an “EO 13771 regulatory action” is defined as “[a] significant regulatory action as defined in section 3(f) of EO 12866” As noted above, this proposed rule is not a significant regulatory action under section 3(f) of EO 12866. Thus, this proposed rule does not require the EEOC to issue two EO 13771 deregulatory actions.

Paperwork Reduction Act

This proposed rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it applies

exclusively to employees and agencies of the federal government and does not impose a burden on any business entities. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This proposed rule does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Age discrimination, Equal employment opportunity, Government employees, Individuals with disabilities, Race discrimination, Religious discrimination, Sex discrimination.

For the Commission,

Dated: December 20, 2018.
Victoria A. Lipnic,
Acting Chair.

Accordingly, for the reasons set forth in the preamble, the Equal Employment Opportunity Commission proposes to amend chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1614 – FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

1. The authority citation for 29 CFR part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; E.O. 11478, 3 CFR, 1969 Comp., p. 133; E.O. 12106, 3 CFR, 1978 Comp., p. 263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

§ 1614.201 [Amended]

2. In § 1614.201, remove paragraph (c).

3. In § 1614.407:

a. Revise the section heading;

b. In the introductory text, remove the word “and” after “ADEA” and add in its place a comma; and add the words “and Genetic Information Nondiscrimination Act” after “Rehabilitation Act”; and

c. Revise paragraphs (a) and (b), and add paragraphs (e) and (f).

The revisions and additions read as follows:

§ 1614.407 Civil action: Title VII, Age Discrimination in Employment Act, Rehabilitation Act, and Genetic Information Nondiscrimination Act.

* * * * *

(a) Within 90 days of receipt of the agency final action on an individual or class complaint;

(b) After 180 days from the date of filing an individual or class complaint if agency final action has not been taken;

* * * * *

(e) After filing an appeal with the EEOC from an agency final action, the complainant, class agent, or class claimant may withdraw the appeal and file a civil action within 90 days of receipt of the agency final action. If the complainant, class agent, or class claimant files an appeal with the EEOC from a final agency action and more than 90 days have passed since receipt of the agency final action, the appellant may file a civil action only in accordance with paragraphs (c) or (d) of this section.

(f) After filing a request for reconsideration of an EEOC decision on an appeal, the complainant, class agent, or class claimant may withdraw the request and file a civil action within 90 days of receipt of the EEOC's decision on the appeal. If the complainant, class agent, or class claimant files a request for reconsideration of an EEOC decision on an appeal and more than 90 days have passed since the appellant received the EEOC's decision on the appeal, the appellant may file a civil action only in accordance with paragraphs (c) or (d) of this section.

4. In § 1614.409, revise the introductory text to read as follows:

§1614.409 Effect of filing a civil action.

Filing a civil action under § 1614.407 or § 1614.408 shall terminate Commission processing of the appeal. A Commission decision on an appeal issued after a complainant files suit in district court will not be enforceable by the Commission. If private suit is filed subsequent to the filing of an appeal and prior to a final Commission decision, the complainant should notify the Commission in writing.

§ 1614.505 [Amended]

5. In § 1614.505(a)(4), remove the reference “(b)(2)” and add in its place “(a)(3).”

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