

DISTRICT OF COLUMBIA
OFFICE OF HUMAN RIGHTS

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B [REDACTED] HORSLEY,)
Complainant,)
)
)
v.) OHR Docket No: 23-096-DC(N)
)
)
DISTRICT OF COLUMBIA)
GOVERNMENT – DMV,)
Respondent.)
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ORDER DENYING RESPONDENT’S MOTION TO DISMISS

The Office of Human Rights (“OHR”) has completed its review of Respondent District of Columbia Department of Motor Vehicles’ Motion to Dismiss (“Motion”), filed May 8, 2023, and Complainant B [REDACTED] Horsley’s Opposition, filed May 18, 2023. Pursuant to 4 DCMR §§ 106.4 and 107 (dismissal for lack of jurisdiction or other valid grounds), OHR hereby **denies** Respondent’s Motion as follows:

PROCEDURAL HISTORY

On December 19, 2022, Complainant filed an initial written complaint with OHR alleging that Respondent discriminated against him based on his family responsibilities.¹ Complainant alleges that, on December 23, 2021, Respondent discriminatorily denied his request to telework so that he could care for his children when schools were shut down due to the COVID-19 pandemic.²

On June 16, 2022, 175 days later, Complainant emailed an EEO Counselor to request assistance.³ However, the counselor never responded.⁴ On June 21, 2022, 180 days later, Complainant contacted a second EEO Counselor to request assistance, and the second counselor likewise did not respond.⁵ Complainant never met with an EEO Counselor and therefore did not receive an Exit Letter.⁶

On December 19, 2022, Complainant filed the instant complaint,⁷ and on February 16, 2023, Complainant filed a perfected Charge of Discrimination.⁸ On April 28, 2023, OHR served a Notice

¹ Initial Written Complaint at 1, Dec. 19, 2022 (OHR File at § F).

² *Id.*

³ Complainant’s Opposition to Motion to Dismiss at Exhibit A, May 18, 2023 (OHR File at § K).

⁴ Charge of Discrimination at 1, Feb. 16, 2023 (OHR File at § E).

⁵ Complainant’s Opposition to Motion to Dismiss at Exhibit B, May 18, 2023 (OHR File at § K); Charge of Discrimination at 1, Feb. 16, 2023 (OHR File at § E).

⁶ *See id.*

⁷ Initial Written Complaint at 1, Dec. 19, 2022 (OHR File at § F).

⁸ Charge of Discrimination, Feb. 16, 2023 (OHR File at § E).

of Charge of Discrimination and Mandatory Mediation to the parties and alerted the parties that mandatory mediation was scheduled for June 12, 2023.⁹ On May 8, 2023, Respondent filed the instant Motion to Dismiss.¹⁰

RESPONDENT'S MOTION TO DISMISS

Respondent's May 8, 2023, Motion asks this Office to dismiss the Charge for lack of jurisdiction, arguing that OHR does not have jurisdiction where Complainant failed to comply with 4 DCMR § 105.1 by not consulting an EEO Counselor within 180 days of the alleged unlawful discriminatory practice.¹¹ Respondent further argues that 4 DCMR § 105.7 requires OHR to dismiss a complaint when a complainant does not file within fifteen days of receiving an Exit Letter, therefore OHR does not have jurisdiction in matters where a complainant never received an Exit Letter.¹²

COMPLAINANT'S OPPOSITION

Complainant filed an opposition on May 18, 2023, arguing that he fulfilled his obligations under 4 DCMR § 105.1 to "consult" an EEO Counselor within 180 days because to "consult" includes to ask the advice of, which he did by emailing two EEO Counselors.¹³ The fact that the EEO Counselors failed to fulfill their obligations to hold a meeting and issue an Exit Letter pursuant to § 105 is irrelevant to Complainant's obligations to file a timely complaint.¹⁴ Complainant also argues that Respondent's interpretation of § 105 would render the provision unconstitutional; to interpret § 105 to extinguish Complainant's ability to file a discrimination complaint where an EEO Counselor fails to fulfill their obligations would violate the Fifth Amendment by depriving Complainant of his right to due process.¹⁵

APPLICABLE LEGAL STANDARDS

A respondent may file a motion to dismiss for lack of jurisdiction, but not to address the merits of a complaint. Notice of Charge of Discrimination and Mandatory Mediation at 3, dated April 28, 2023 (OHR File at § G) ("A Motion to Dismiss may not be filed to address the merits of the Charge"). Rather, a merits determination is made through an investigation based on the probable cause standard. *See Sparrow v. D.C. Office of Human Rights*, 74 A.3d 698, 703 (D.C. 2013) (noting that "[i]n an employment discrimination case brought under the District of Columbia Human Rights Act, OHR conducts an initial investigation to determine whether there is probable cause to credit the complainant's allegations.").

⁹ Notice of Charge of Discrimination and Mandatory Mediation at 1, Apr. 28, 2023 (OHR File at § G).

¹⁰ Respondent's Motion to Dismiss, May 8, 2023 (OHR File at § K).

¹¹ *Id.* at 1-2

¹² *Id.* at 2-3

¹³ Complainant's Opposition to Motion to Dismiss at 2, May 18, 2023 (OHR File at § K).

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 4.

OHR'S FINDINGS

As a threshold matter, Respondent's Motion was timely filed because it was received on May 8, 2023, within ten calendar days of service of the Charge on April 28, 2023, as required. *See* Notice of Charge of Discrimination and Mandatory Mediation at 3, dated April 28, 2023 (OHR File at § G) (providing a ten-day filing period for a motion to dismiss). However, dismissal is not warranted because the complaint was timely filed.

4 DCMR § 105.1 provides that a D.C. Government employee who believes they have been discriminated against must "consult an EEO Counselor within one hundred-eight (180) days of the occurrence of the alleged unlawful discriminatory practice, except that a complaint of sexual harassment may be filed directly with OHR." If no resolution is reached after consulting an EEO Counselor, the counselor is required to issue an Exit Letter, and a complainant must file a complaint with OHR within fifteen days of receiving the Exit Letter. *See* 4 DCMR § 105.6.

Complainant made a good faith effort to meet with an EEO Counselor and obtain an Exit Letter by emailing one on June 16, 2022, and then emailing a second one on June 21, 2022, both within 180 days of the alleged discriminatory practice on December 23, 2021.¹⁶ In doing so, Complainant fulfilled his obligation to "consult" an EEO Counselor pursuant to § 105.1. Indeed, the regulation does not say an employee is required to "consult *with*" an EEO Counselor, implying mandatory bilateral action, only that they are required to "consult" one. *Id.* Here, Complainant consulted two within 180 days of December 23, 2021, by emailing two to seek their assistance and ask for their availability.

Regarding Complainant's failure to file within fifteen days of receiving an Exit Letter, OHR finds no such requirement when, through no fault of Complainant's, there was no Exit Letter. Complainant is correct in his Opposition that 4 DCMR § 105.2 through § 105.5 pertain to an EEO Counselor's obligations "after being consulted by a complainant" (*id.* at § 105.2) and are therefore irrelevant to whether Complainant complied with his obligations under § 105. Complainant fulfilled his obligations under § 105 by timely consulting an EEO Counselor. An EEO Counselor's failure to comply with *their* obligations under § 105 does not preclude Complainant from being able to pursue his rights under the D.C. Human Rights Act ("DCHRA"). *See Niskey v. Kelly*, 859 F.3d 1, 9 (D.C. Cir. 2017) (holding that an employee could still bring a Title VII employment discrimination claim even after failing to file within 30 days of consulting an EEO counselor where "the EEO Counselor completely dropped the ball on processing his formal claim" and "ignored her obligation under the regulations to begin the EEO process immediately"). To interpret the requirements of § 105.2 through § 105.5 to be a complete bar to filing a discrimination claim where an EEO Counselor ignores their obligations would yield a plainly inequitable result. For example, a D.C. Government employer could skirt its obligations under the DCHRA by simply not employing any EEO Counselors. Such an interpretation would unnecessarily undermine the purpose of the DCHRA itself, which is "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit[.]" *See* D.C. Code § 2-1401.01.

¹⁶ *See* Charge of Discrimination at 1, Feb. 16, 2023 (OHR File at § E).

Finally when, despite good-faith effort, Complainant could not obtain an Exit Letter and start the fifteen-day filing period, he complied with the statute of limitations for all cases in which there is no EEO counseling requirement by filing within one year of the alleged discriminatory practice.¹⁷ *See* D.C. Code § 2-1403.04 (providing a one-year statute of limitations for filing discrimination complaints with OHR). OHR therefore has jurisdiction over the complaint.

In sum, based on the foregoing reasons, the Motion is **DENIED**.

CONCLUSION

Accordingly, pursuant to 4 DCMR §§ 106.4 and 107.1, it is hereby

ORDERED, that Respondent's Motion to Dismiss is **DENIED**; and it is further

ORDERED, that the parties are to contact the Alternative Dispute Resolution Unit at OHR.ADR@dc.gov within fifteen days to schedule mandatory mediation.

IT IS SO ORDERED.



Hnin Khaing, Director
District of Columbia Office of Human Rights

¹⁷ *See id.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 14, 2023 (date), I
caused OHR's **Order Denying Respondent's Motion to Dismiss** to be served on the following
individuals via email (method of delivery):

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Signature