

Notes from the Field

Assert Timeliness Issue Early to Preserve the Defense in Title VII Cases

Major Jeannine C. Hamby
Litigation Attorney
U.S. Army Legal Services Agency
Litigation Division, Civilian Personnel Branch
Arlington, Virginia

In a recent case, *Ester v. Principi*, the Court of Appeals for the Seventh Circuit indicated its intent to preclude federal agencies from asserting dispositive timeliness defenses in certain Title VII cases.¹ The Seventh Circuit concluded that when an agency “decides the merits of a[n Equal Employment Opportunity (EEO)] complaint during the administrative process without addressing the question of timeliness, [the agency] waives a timeliness defense in a subsequent lawsuit.”² The court found that the Department of Veterans Affairs (VA) waived its right to argue that the plaintiff “failed to timely exhaust the administrative remedies available to him,” because the VA ruled on the merits of plaintiff’s claims without addressing the issue of his failure to timely file his administrative complaint.³ In *Ester*, the court applied this rule *only* to timeliness issues arising in the administrative process; the court did not address the timing requirements for filing a judicial complaint.⁴

The Facts of Ester

In January 1994, the VA notified Ester that it had selected a female applicant to fill a position he had applied for. After filing a timely informal complaint, Ester received written notice

on 17 March 1994 that he had fifteen days to file a formal EEO complaint. Ester filed his formal complaint, however, on 19 April 1994—thirty-three days later.⁵ The VA did not assert that the plaintiff’s formal complaint was untimely during an initial and supplemental investigation. In fact, both investigative reports “specifically concluded that Ester had met all procedural requirements for filing a formal complaint.”⁶ On 29 January 1999, the VA rejected Ester’s complaint on substantive grounds, without mentioning Ester’s failure to timely file his formal complaint.⁷ Ester subsequently filed a judicial complaint in the U.S. District Court for the Northern District of Illinois. The district court granted the VA’s motion for summary judgment, on the grounds that Ester’s failure to file his formal EEO complaint on time constituted failure to exhaust his administrative remedies.⁸

Analysis

The Court of Appeals for the Seventh Circuit could have issued a narrow rule—deciding that, on these facts, the VA was equitably estopped from raising the timeliness issue for the first time in district court. The court went further, however, and cre-

1. 250 F.3d 1068 (7th Cir. 2001).

2. *Id.* at 1072-73.

3. *Id.* The federal sector EEO rules found in 29 C.F.R. § 1614.105 require that persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap must consult an Equal Employment Opportunity counselor within forty-five days of the date of the matter alleged to be discriminatory. Section 1614.105 also provides that if the matter cannot be resolved, the counselor will provide written notice to the aggrieved person informing them that they have the right to file a formal discrimination complaint. 29 C.F.R. § 1614.105 (2001). Section 1614.106 provides that the aggrieved person must file the formal discrimination complaint within fifteen days of receipt of the notice from the counselor. *Id.* § 1614.106. Aggrieved persons who contact an EEO counselor or file their formal complaints after the prescribed time period are considered to have not exhausted their administrative remedies. The circuits have construed the administrative timeliness requirements as statutes of limitation that are subject to waiver, estoppel, and equitable tolling. *See, e.g.,* Fitzgerald v. Henderson, 251 F.3d 345 (2d Cir. 2001); Jensen v. Frank, 912 F.2d 517 (1st Cir. 1990); Warren v. Dep’t of the Army, 867 F.2d 1156 (8th Cir. 1989); Temengil v. Trust Territory of Pac. Islands, 881 F.2d 647 (9th Cir. 1989); Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987); Hornsby v. United States Postal Serv., 787 F.2d 87 (3d Cir. 1986); Henderson v. United States Veterans Admin., 790 F.2d 436 (5th Cir. 1986); Zografov v. Veterans Admin. Med. Ctr., 779 F.2d 967 (4th Cir. 1985); 766 F.2d 490 (11th Cir. 1985); Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984); Miller v. Marsh; Saltz v. Lehman, 672 F.2d 207 (D.C. Cir. 1982).

4. Federal law requires an aggrieved party to file a civil action within ninety days of receipt of the final administrative decision. 42 U.S.C. § 2000e-16(c) (2000). The Supreme Court has ruled, however, that the ninety-day statute of limitations is subject to the doctrine of equitable tolling. *See* Irwin v. Veterans Admin., 498 U.S. 89 (1990).

5. Ester’s complaint alleged sexual discrimination, and retaliation for prior discrimination complaints. *Ester*, 250 F.3d at 1070.

6. *Id.*

7. *Id.* at 1071.

8. *Id.*

ated a clear standard on this issue: whenever an agency reaches the merits of an administrative complaint without preserving timeliness issues, the agency has waived a timeliness defense in a subsequent lawsuit.⁹ The court's standard does not preclude an agency from deciding the merit of an untimely administrative complaint; the court merely requires the agency to find the complaint untimely before reaching a substantive decision.¹⁰

Practitioners, especially in the Seventh Circuit (Wisconsin, Illinois, and Indiana), must ensure that they raise timeliness issues early in the administrative process.¹¹ While *Ester* does not specify when the agency must raise timeliness issues, the agency should always raise or identify such issues at its first opportunity to address the complaint. Labor counselors must be vigilant to preserve timeliness issues during the administrative processing of complaints. In the Seventh Circuit, the Army must raise the issue before the installation, or the EEOC Complaints, Compliance, and Revision Agency, issues a final Army decision. Failure to raise a timeliness defense early may waive the Army's ability to raise this potentially dispositive issue in federal court.

The Court of Appeals for the Seventh Circuit decision in *Ester* may discourage federal agencies from investigating substantively meritorious discrimination claims. Its requirement that an agency raise any timeliness issue during the administrative process may unintentionally cause EEO counselors to focus only on the procedural aspects, rather than the merits, of the claims. The EEO counselor may then dismiss otherwise meritorious claims that deserve investigation.

The administrative process is designed to resolve claims at the lowest level, with a view towards doing the right thing.

Whether the court's decision in *Ester* hurts or helps the system remains to be seen.

Explosive Detection Dogs Assistance to Civilian Law Enforcement Agencies

*Captain Jon D. Holdaway*¹²
U.S. Army Trial Defense Service
Fort Sill, Oklahoma

After the 11 September 2001 tragedy and subsequent terrorist threats, civilian law enforcement agencies (CLEAs) are more sensitive to potential incidents involving explosive devices. The best tool available to determine whether a package or item is an explosive device is the Explosive Detection Dog (EDD), also known as the "bomb-dog." These dogs are similar to other "K-9" dogs, but receive extended training in searching for and locating explosive materials.¹³ Unfortunately, most CLEAs cannot afford the expensive training, care, and maintenance of these dogs. Civil Law Enforcement Agencies located near a military installation, however, can request military EDD support.

The EDDs are a Department of Defense (DOD) asset; the Air Force is the executive agent for managing this program. The Army and the DOD monitor EDD use and deployment.¹⁴ The DOD sends EDD teams throughout the United States for assignments, such as very important person (VIP) details, public event assistance, and emergency incident responses.¹⁵

The regulations and analysis applicable to EDD assistance differ from standard CLEA assistance or domestic operational support. In addition to the standard DOD instructions and

9. This was a question of first impression for the court. In reaching its decision, the Seventh Circuit specifically rejected the non-uniform results of circuits that had already addressed the issue. *Id.* at 1071. In *Rowe v. Sullivan*, the Fifth Circuit Court of Appeals required the agency to make an explicit finding of timeliness before it would find that the agency had waived timeliness as a defense. 967 F.2d 186, 191 (5th Cir. 1992). The Court of Appeals for the Ninth Circuit adopted a rule that when an agency makes a finding of discrimination, it waives the timeliness defense. *See Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985).

10. The Seventh Circuit did not reject the "well-settled rule that agencies do not waive a timeliness defense merely by accepting and investigating a discrimination complaint." *Id.* at 1072 n.1.

11. *Ester* has not yet been cited in other published Title VII cases, and *Ester* does not cite other cases to support its decision on the timeliness waiver. There is, however, an unpublished district court opinion from the Third Circuit that found that the "government waived its timeliness defense by failing to raise it in the administrative proceeding." *Tinnin v. Danzig*, No. CIV.A.99-1153, 2000 U.S. Dist. LEXIS 1392, at *1 (E.D. Pa. Feb. 4, 2000). In reaching this conclusion, the *Tinnin* court stated:

We believe that the [EEOC's change at 29 C.F.R. § 1614.107(a)(2)] from "may" [dismiss] to "shall" [dismiss] is significant. The effect of the amended regulation is to have the tardiness issue raised and decided early and the claim brought to a prompt end if the plaintiff was in fact late, without the needless expenditure of time and money on the merits. The government should not be allowed to undercut the regulation by ignoring this defense at the administrative level and belatedly springing it on plaintiff for the first time in the district court. The government has waived its timeliness defense by failing to raise it in the administrative proceeding.

Id. at *9.

12. I want to thank Air Force Major Jeanne Meyer, International and Operational Department, The Judge Advocate General's School, for providing editorial guidance and suggestions for this article.

13. *See U.S. DEP'T OF ARMY, REG. 190-12, MILITARY WORKING DOGS* para. 4-6 (30 Oct. 1993) [hereinafter AR 190-12].

14. *Id.* para. 1-4.

Department of the Army regulations that establish rules for use of DOD and Army resources in support of CLEAs,¹⁶ specific Army regulations define how EDD teams can be used for CLEA support.¹⁷

When analyzing a CLEA request for the use of military EDD support, judge advocates should address the following five areas: receipt of the request, authorization, reimbursement and indemnification, manner of response, and reporting requirements.

Receipt of the Request

Upon receipt of a request from a CLEA for the use of an EDD team, the judge advocate should ask two questions: why the CLEA needs the team, and whether the Posse Comitatus Act (PCA)¹⁸ applies. The PCA prohibits direct assistance to CLEAs.¹⁹ Direct assistance includes interdiction efforts, searches and seizures, arrests, apprehensions and “stop and frisks.”²⁰ For example, a CLEA cannot use a military dog to locate a suspect hiding in a building, because use of military assets in a criminal search violates the PCA. Support missions to CLEAs that do not involve the dogs in direct law enforcement activities, however, are permissible. For these missions, the dogs are viewed as “equipment” and handlers viewed as “equipment operators.”²¹

There are two categories of CLEA requests for EDD support: advance, and “immediate response.”²² Advance requests must be written. If necessary, a CLEA request for immediate response can be oral; however, the CLEA must submit a post-

incident written request. All reports and requests for assistance forwarded to Headquarters, Department of the Army (HQDA), must include a written request.²³

Authorization

If the incident requires an immediate response, the approval authority is the installation commander.²⁴ If there is not a requirement for an immediate response ((VIP) visits, support negotiated by a memorandum of agreement (MOA), and other advance requests), the approval authority is the Directorate of Military Support (DOMS).²⁵

Reimbursement and Indemnification

Generally, CLEAs must reimburse the DOD when they receive equipment or services.²⁶ Requesting CLEAs must agree, as a condition for EDD response, to release the DOD from liability for acts committed by EDD teams and to reimburse the DOD for services rendered.

Historically, *Army Regulation 190-12* mandated the use of Department of Defense (DD) Form 1926 (Explosive Ordnance Disposal Civil Support Release and Reimbursement Agreement).²⁷ Although this form has been discontinued, judge advocates should use the principles behind DD Form 1926 when negotiating agreements with EDD-supported CLEAs. First, the agreement should place CLEAs on notice that responsibility and liability for U.S. Army EDD units responding to requests for assistance and for disposing of non-military explosives or chemicals remains with the requesting local authority.

15. For example, EDD teams were used in response to the 1996 Oklahoma City bombing. See Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at nn.130-34 and accompanying text.

16. See U.S. DEP'T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVILIAN AUTHORITIES (18 Feb. 1997) [hereinafter DOD DIR. 3025.15]; U.S. DEP'T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (15 Jan. 1986) [hereinafter DOD DIR. 5525.5]; U.S. DEP'T OF ARMY, REG. 500-51, SUPPORT TO CIVILIAN LAW ENFORCEMENT (1 July 1983) [hereinafter AR 500-51].

17. See AR 190-12, *supra* note 13.

18. 18 U.S.C. § 1385 (2000). The Act proscribes the use of military personnel in law enforcement activities within the boundaries of the United States. See *id.*

19. See *id.*

20. AR 500-51, *supra* note 16, para. 3-5.

21. See Winthrop, *supra* note 15, at nn.131-33 and accompanying text.

22. See DOD DIR. 3025.15, *supra* note 16, para. 4.7 (defining immediate response as “immediate action taken by the installation commander to save lives, prevent human suffering, or mitigate property damage under imminently serious conditions”).

23. *Id.* para. 4.7.1.

24. AR 190-12, *supra* note 13, para. 4-7. This authority can be delegated to “any Component or Command.” DOD DIR. 3025.15, *supra* note 16, para. 4.7.1.

25. See DOD DIR. 5525.5, *supra* note 16. See also AR 500-51, *supra* note 16, para. 1-8.

26. DOD DIR. 5525.5, *supra* note 16, para. E5.2.1.

27. AR 190-12, *supra* note 13, para. 4-7c(2).

Second, the agreement should release the Army from liability for personal injuries, collateral property damages, and the like, which may occur during EDD services. These measures reduce or eliminate the scope of the Army's potential liability for damages. Finally, the contract should bind the requesting local authority to indemnify the Army for any liability resulting from the request.

To cover release and reimbursement across the scope of potential EDD requests, judge advocates should incorporate the above principles into three methods. The first method is to execute annual MOAs with CLEAs, located within the immediate vicinity of the installation, that frequently request EDDs.²⁸ These MOAs should establish the terms for immediate responses only—not advance requests, such as VIP visits. The second method is execution of MOAs for advance requests. These agreements will involve seeking authorization from HQDA. The third method is for an emergency response without a pre-established MOA. In this situation, the requesting agency orally agrees to the terms of the agreement. As soon after the incident as possible, the installation's provost marshal should execute the written agreement with the serviced CLEA. The executed agreement then accompanies the incident report to the DOMS.

If a CLEA requests non-reimbursable support, it must provide a legal and factual justification for a waiver of reimbursement.²⁹ The installation commander cannot waive reimbursement; he must forward the waiver request from the CLEA to DOMS. The only grounds for waiving reimbursement are that:

[(1) The assistance i]s provided incidental to an activity that is conducted for military purposes.

[(2) The assistance i]nvolves the use of DOD personnel in an activity that provides DOD training operational benefits that are substan-

tially equivalent to the benefit of DOD training or operations.³⁰

Response

Army Regulation 190-12 implements the principles of the PCA. Explosive Detection Dog handlers and spotters can provide assistance only while “unarmed and [without distinctive military police] accessories (badge, brassard, lanyard, handcuffs, [utility belt, baton]).”³¹ An agent of the CLEA, furthermore, must always accompany the EDD team.³² The key is that EDD handlers respond as equipment operators, not as law enforcement officials.

While engaging in explosive detection assistance, military EDD handlers and their dogs may only use the team's “searching and detecting capabilities.”³³ The team cannot “track and search a building or area for, and/or detect, pursue, and hold, an intruder or offender suspect.”³⁴

Once the EDD responds to a potentially explosive device, the handler should withdraw and allow the CLEA representative to handle the situation.³⁵

Reporting

The type of response determines the type of report required. In immediate response cases, the incident must be reported to the DOMS. The installation commander (or his delegate) follows up on the initial report immediately after the incident. If possible, the report should include a copy of the request from the CLEA and the MOA.³⁶ When the installation commander receives prior authorization from DOMS to provide EDD support to a CLEA (through a MOA), he includes the incident in the quarterly report on installation support to CLEAs.³⁷

28. Judge advocates should coordinate with the installation's Directorate of Resource Management for the execution of these MOAs.

29. DOD DIR. 3025.15, *supra* note 16, para. 4.12.

30. DOD DIR. 5525.5, *supra* note 16, para. E5.2.2. These are grounds for waiver only if “reimbursement is not otherwise required by law.” *Id.*

31. AR 190-12, *supra* note 13, para. 4-7c(6).

32. *Id.* para. 4-7c(8).

33. *Id.* para. 4-7c(7).

34. *Id.*

35. *See id.* para. 4-7c(8).

36. The DOMS can be contacted at (703) 697-1096/695-2003; facsimile: (703) 697-3147; address: Directorate of Military Support; 400 Army Pentagon; Room BF762, Pentagon; Washington, D.C. 20310.

37. AR 500-51, *supra* note 16, para. 1-5.

Conclusion

When advising commanders on issues involving domestic operations, judge advocates must match the facts to the applicable statutes and regulations. Proper analysis of CLEA requests for EDD teams is crucial, because the clear lines estab-

lished by the PCA can easily become blurred or completely disappear. By following the above steps, the Army can provide effective, safe, and proper CLEA assistance.

Appendix: Explosive Detection Dog

Civil Support Release and Reimbursement Agreement

AGREEMENT BETWEEN

[INSTALLATION]

AND

REQUESTING AGENCY OR CIVIL AUTHORITY: _____

In the event that the United States, through the Department of the Army and [INSTALLATION], begins explosive detection dog (EDD) procedures

upon (*type device*) _____

located at (*street, location/city/state*) _____

then, in consideration therefore, and in recognition of the peculiar hazards involved in the detection of non-military commercial-type explosives, chemicals, or similar dangerous articles, (*requesting agency or civil authority*)

_____ (hereinafter, referred to as Requestor) agrees:

1. To reimburse the Department of the Army for the costs involved in furnishing all requested EDD services. Such costs may include personal services of civilian employees, travel and per diem expenses for military and civilian personnel, and other expenses to include transportation and supplies, materiel, and equipment with prescribed noncommercial charges; costs of consumed supplies, materiel, and equipment and such supplies, materiel, and equipment which is damaged beyond economical repair; and costs of repairing or reconditioning nonconsumable items not damaged beyond economical repair.
2. To consider all military and civilian personnel of the United States and the Department of the Army involved in furnishing requested EDD services as its own agents or servants.
3. To hold the United States and the Department of the Army and all military and civilian personnel of the Department of the Army harmless for any consequences of services rendered pursuant to this agreement without regard to whether the services are performed properly or negligently. (*This paragraph is inapplicable if the Requestor is the United States Government or one of its instrumentalities*).
4. To indemnify the United States and the Department of the Army and all military and civilian personnel of the Department of the Army for any costs incurred as a result of any claims or civil actions brought by any third person as a result of the services requested, even though negligently performed, and to pay all costs of settlement or litigation.
5. To file no claim for administrative settlement with any Federal agency nor to institute any action or suit for money damages in any court of the United States or any State for injury to or loss of property or for personal injury or death caused by the negligence or wrongful act or omission of any military or civilian employee of the United States or the Department of the Army while such employee is engaged in rendering EDD services pursuant to this agreement.

AUTHORIZED REPRESENTATIVE OF REQUESTOR

AUTHORIZED REPRESENTATIVE OF [INSTALLATION]

DATE