



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

████████████████████  
Wyatt W.,<sup>1</sup>  
Complainant,

v.

Matthew G. Whitaker,  
Acting Attorney General,  
Department of Justice  
(Executive Office of the U.S. Attorneys),  
Agency.

Appeal No. 0120182706

Agency No. USA-2018-00342

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated July 6, 2018, pertaining to his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

**BACKGROUND**

During the relevant time, Complainant worked as a Support Services Specialist for the Administrative Unit of the Agency's Office of Legal Education in Columbia, South Carolina.

Believing that his supervisor was subjecting him to a hostile work environment, Complainant contacted an EEO Counselor on January 26, 2018. Informal efforts to resolve Complainant's concerns were unsuccessful. Subsequently, on April 25, 2018, Complainant filed a formal complaint based on age, race, and reprisal for prior protected EEO activity.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

According to Complainant, he had been subjected to a hostile work environment since 2014. Complainant claimed that his supervisor was disrespectful when a colleague was in Complainant's office, his tour of duty was changed to attend training, and, most recently, he was placed on leave restriction on November 29, 2017.

In its July 6, 2018 decision, the Agency dismissed the formal complaint for untimely EEO Counselor contact. The Agency determined that, based on the most recent discriminatory event on November 29, 2017, Complainant should have contacted an EEO Counselor by January 15, 2018. Complainant's initial EEO contact, however, was not until January 26, 2018.

When asked why his initial EEO Counselor contact was late, Complainant explained that he was out on approved FMLA leave related to stress-related symptoms. Complainant stated that he had visited the Emergency Room on December 14, 2017, was told to avoid stress and was prescribed medications that made him drowsy. Complainant did not return to work until January 16, 2018. The Agency reasoned that Complainant was not incapacitated, noting specifically that he was able to work between November 29, 2017 and December 14, 2017. Additionally, the Agency noted that Complainant did not provide any medical documentation to support his alleged incapacity.

Complainant filed the instant appeal. On appeal, Complainant argues that when his "FMLA leave is considered" his EEO Counselor contact was timely. Complainant reiterates the reasons he provided to the EEO Counselor for his delayed contact. Complainant asserts that because he should not have been working while out on FMLA, he was unable to file a work-related complaint.

### ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.

EEOC regulations provide that the agency or the Commission shall extend the time limits when the individual shows that he was not notified of the time limits and was not otherwise aware of them, that he did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he was prevented by circumstances beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

In the instant case, Complainant's contact was beyond the forty-five-day time limitation. While Complainant argues that the time limit should be tolled for the time he was on FMLA leave, the Commission disagrees. We have consistently held, in cases involving physical or mental health difficulties, that an extension is warranted only where an individual is so incapacitated by his condition that he is unable to meet the regulatory time limits.

See Davis v. U.S. Postal Serv., EEOC Request No. 05980475 (Aug. 6, 1998); Crear v. U.S. Postal Serv., EEOC Request No. 05920700 (Oct. 29, 1992). Complainant has failed to do so here. While he describes the need to avoid stress and medications that made him drowsy, during a portion of the forty-five-day time period, he has not shown that he was rendered incapacitated. Therefore, we find that the Agency's decision to dismiss the complaint for untimely EEO Counselor contact was proper.

### CONCLUSION

The Agency's final decision dismissing the formal complaint for the reason discussed above is **AFFIRMED**.

### STATEMENT OF RIGHTS - ON APPEAL

#### RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

November 30, 2018

Date