



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

████████████████████  
George H.,<sup>1</sup>  
Complainant,

v.

Robert Wilkie,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2019000613

Agency Nos. 200J-0578-2018100262 and 200J-0578-201805025

**DECISION**

Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decisions dated March 26, 2018, and September 11, 2018, dismissing his complaints 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Medical Support Assistant, GS-5, at the Agency's Edward Hines Jr. VA Hospital facility in Hines, Illinois.

*Complaint 1*

Complainant filed Agency Complaint No. 200J-0578-201800262 on January 5, 2018, alleging he was discriminated against based on disability and reprisal when: (1) his workers' compensation claim was denied; (2) from July 27, 2017 to August 5, 2017, he was charged with absence without official leave (AWOL).

On March 26, 2018, the Agency dismissed claim 1 as a collateral attack on the workers' compensation process and claim 2 for untimely EEO counselor contact.

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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.

### *Complaint 2*

Complainant filed Agency Complaint No. 200J-0578-20180525 on August 7, 2018, alleging he was subjected to a hostile work environment based on race (Black) and disability when: (1) on February 20, 2018, a coworker, TK, directed Complainant to take off his shoes; (2) on March 3, 2018, TK told Complainant “Pick up your feet!” and, “I tell my kids to pick up their feet all the time;” and (3) on March 4, 2018, TK said to Complainant, “That’s good..., now people, maybe some of us will/might start to like you cause we couldn’t stand the shoes you wear; and TK said to Complainant, “...this is you” and repeatedly smacked a black “damn it” doll adorned with dreadlocks on a printer.”

On September 11, 2018, the Agency dismissed Agency Complaint No. 200J-0578-201805025 for untimely EEO counselor contact.

On September 11, 2018, Complainant filed his appeal. The appeal form carried the number 200J-0578-201800262 and was signed September 11, 2018. However, written documents submitted referenced 200J-0578-201805025, which created some confusion as to which Agency decision Complainant was actually appealing. In the interest of judicial efficiency, we will address the Agency’s dismissal of both complaints in this appeal.

## ANALYSIS AND FINDINGS

### *Complaint 1 – 200J-0578-2018000262*

As an initial matter, it appears that Complainant’s appeal of this complaint was untimely filed. Nonetheless we will address it because we cannot determine exactly when Complainant received the Agency’s dismissal decision.

To the extent Complainant raised a claim concerning the denial of his worker’s compensation claim, we find this was properly dismissed as a collateral attack on the workers’ compensation adjudicatory process and does not state a viable claim to be addressed with an administrative EEO complaint. See Fisher v. Dep’t of Defense, EEOC Request No. 05931059 (July 15, 1994).

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.

The record discloses that the last day Complainant was charged AWOL was August 5, 2017, but he did not initiate contact with an EEO counselor until October 13, 2017, which is beyond the forty-five (45) day limitation period. Complainant has not provided adequate justification, either

below or on appeal, to excuse his delay in seeking counseling. As such, we affirm the Agency's dismissal of claim 2 for untimely EEO counselor contact.

*Complaint 2 200J-0578-2018105025*

The record discloses that the latest event Complainant alleged in support of his harassment claim occurred on March 4, 2018, but he did not initiate contact with an EEO counselor until July 5, 2018, which is beyond the forty-five (45) day limitation period. Complainant asserted that he had medical reasons for his untimely EEO counselor contact as he had been diagnosed with cancer. The Agency noted that Complainant was at work at least four hours a day from April 16, 2018 through July 4, 2018, and for some of that period could have sought EEO counseling. To the extent Complainant submitted medical documentation concerning his cancer, 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 Service, EEOC Request No. 05980475 (Aug. 6, 1998); Crear v. U.S. Postal Service, EEOC Request No. 05920700 (Oct. 29, 1992). Here, Complainant was able to work on a part-time basis during the relevant time period for contacting an EEO counselor and has not shown that he was incapacitated for the entire time period from contacting an EEO counselor. Therefore, we find that Complainant has failed to provide sufficient justification for extending or tolling the limitation period as related to this complaint.

CONCLUSION

Accordingly, the Agency's final decisions dismissing Complainant's complaints are 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)

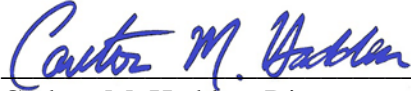
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

February 27, 2019

Date