



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

[REDACTED]  
Orson R.,<sup>1</sup>  
Complainant,

v.

Robert Wilkie,  
Secretary,  
Department of Veterans Affairs  
(Veterans Health Administration),  
Agency.

Appeal No. 2019005308

Agency No. 200305542018106488

**DECISION**

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's June 7, 2019, dismissal of 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 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 an Anesthesiologist, GS-15, at the Agency’s Eastern Colorado Health Care System, in Denver, Colorado.

On May 1, 2019, Complainant filed a Formal EEO Complaint alleging that the Agency subjected him to discrimination and harassment on the bases of disability (mental, unspecified) and reprisal (engaging in prior protected activity) when:

1. On August 20, 2018, the Director (“D1”), notified him that on August 7, 2018, she sent the Texas, California, and Colorado State Medical Boards allegations of Unprofessional Conduct and Impairment related to a closed incident,

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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.

2. On August 31, 2018, the Supervisory Attending Physician (“S1”), failed to take appropriate corrective actions when Complainant informed him that another Attending Physician made disparaging comments and subjected him to a hostile work environment, and,
3. On August 31, 2018, S1 assigned Complainant double the normal workload of his coworkers, disregarding his disabilities and reasonable accommodation.

On September 26, 2018, Complainant initiated EEO contact. During the informal counseling process, Complainant was notified of his right to representation, but he did not indicate to the EEO Counselor that he obtained representation for his complaint. On November 7, 2018, Complainant agreed to participate in alternative dispute resolution (“ADR”), which extended the EEO counseling period to 90 days (concluding December 26, 2018).

In November 2018, two EEO Program Managers from the Agency’s Office of Resolution Management (“ORM”) contacted Complainant to obtain his ADR paperwork. Complainant signed the forms, but left the space for a representative blank. Email correspondence between the EEO Program Managers indicates that Complainant verbally notified ORM that he obtained legal representation, but had not decided whether to have his attorney present for mediation.

On December 7, 2018, Complainant emailed one of the EEO Program Managers, stating, “I am naming the firm of [name of law firm] as representation for the mediation.” Subsequently, an attorney from the firm emailed the EEO Program Manager, who added his name in scheduling emails for mediation, expressly identifying him as Complainant’s “attorney/representative.” On December 13, 2018, the parties engaged in mediation, but reached an impasse.

On December 24, 2018, the Agency issued Complainant a Notice of Right to File (“NRTF”) in accordance with the 90 day time frame. The NRTF was delivered to Complainant’s address of record on January 7, 2019 with signature confirmation. However, Complainant did not receive it. The NRTF was not sent to Complainant’s attorney.

On April 8, 2019, Complainant’s attorney spoke with the ORM Assistant District Manager by phone, which is when he learned that the NRTF had already been issued. At his attorney’s instruction, Complainant emailed the ORM Assistant District Manager, requesting that he reissue the NRTF and provide a copy to his attorney.

On April 16, 2019, the ORM Assistant District Manager sent Complainant and his attorney a copy of the NRTF, while maintaining the Agency’s position that Complainant already received it on January 7, 2019, and that Complainant failed to properly notify the Agency that he was represented by an attorney when it was issued on December 24, 2018. Complainant, through his attorney, filed his formal complaint on May 1, 2019.

The Agency dismissed the matter pursuant to 29 C.F.R. § 1614.107(a)(2), due to the untimely filing of the formal complaint.

The instant appeal followed.

### ANALYSIS AND FINDINGS

In relevant part, 29 C.F.R. §1614.107(a)(2) provides that an agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105 and §1614.106, unless the agency extends the time limits in accordance with §1614.604(c). Under 29 C.F.R. §1614.106(b) a complainant must file their written complaint with the agency that allegedly discriminated against them within 15 calendar days after the date of receipt of the Notice of Right to File (“NRTO”). 29 C.F.R. §1614.105(d), (e), or (f).

The Agency has the burden of proving that the complainant received the notice and that the notice clearly informed the aggrieved person of the 15-day filing time frame. See Paoletti v. United States Postal Serv., EEOC Request No. 05950259 (Aug. 17, 1995). This 15-day time limit is also subject to waiver, estoppel, and equitable tolling under 29 C.F.R. § 1614.604(c).

In cases where the complainant designates an attorney as representative, service of all official correspondence shall be made on the attorney and the complainant, but time frames for receipt of the materials shall be computed from the time of receipt by the attorney. 29 C.F.R. §1614.605(d); Blakemore v. Dep’t of the Navy, EEOC Appeal No. 01A42421 (Aug. 5, 2004) (finding complaint’s formal complaint, filed after the 15 day time frame, timely when the agency failed to serve notice to complainant’s attorney.) Pursuant to 29 C.F.R. § 1614.605(d) a complainant can designate an attorney representative by providing the EEO contact with “written notice of the name, address and telephone number of a representative for the complainant.” However, at all times, Complainant is responsible for proceeding the complaint whether or not a representative has been designated. 29 C.F.R. §1614.605(e).

The Agency provided sufficient tracking and time stamp evidence that the NRTF was delivered to Complainant’s address of record, and signed for on January 7, 2019, establishing the rebuttable presumption of constructive receipt. On appeal, Complainant offers his sworn testimony that he never received the NRTF and did not know who would have signed the delivery confirmation on his behalf. We also note that the signature evincing receipt appears different than Complainant’s signature on other documents in the record. We find Complainant successfully rebutted the presumption of constructive receipt.

Regardless, in this case, Complainant is and was represented by an attorney, so timeliness of his formal complaint is based on his attorney’s date of receipt, not Complainant’s. The Agency argues that it did not send Complainant’s attorney a copy of the NRTF because Complainant failed to provide proper notice of representation. Specifically, it notes that there is no evidence that Complainant provided the Agency with any information in writing other than the name of the law firm, and the name and email of his attorney, which does not meet the requirements of 29 C.F.R. § 1614.605(d).

However, the attorney was introduced by Complainant to the ORM EEO officials in person, when he represented Complainant during mediation on December 13, 2018. We find this sufficient to place the Agency on notice that Complainant was represented by an attorney and obligated it to send a copy of the NRTF and all other correspondence for this complaint to the attorney.

The record reflects that the ORM Assistant District Manager sent a copy of the NRTF to Complainant's attorney on April 16, 2019. Complainant's formal complaint was filed on May 1, 2019, which falls within the 15-day time frame. Accordingly, his formal complaint was timely filed.

### CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED and REMANDED for further processing in accordance with the following ORDER:

### ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 CFR § 1614.503(f) for enforcement by that agency.

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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **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

October 2, 2019  
Date