



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

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

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2024004108

Agency No. 200H-528-2024-156509

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (FAD) dated May 31, 2024, dismissing her 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. For the reasons presented below, we AFFIRM the Agency's final decision dismissing the complaint.

**ISSUE PRESENTED**

Whether the Agency's final decision properly dismissed Complainant's formal complaint.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Advanced Medical Support Assistant (AMSA) at the Agency's VA Western NY Health Care System at Buffalo in Buffalo, New York.

On February 16, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of age and reprisal when:

1. On August 16, 2023, and September 18, 2023, Complainant was told by Supervisor 1 and Supervisor 2 to work in the eye clinic, which was in violation of her approved reasonable accommodation.
2. On December 22, 2023, Supervisor 1 told Complainant "if you need help filling in retirement papers, let me know," although Complainant did not have plans to retire.
3. On January 5, 2024, Complainant received an email from Supervisor 2 stating, "disciplinary action will be taken" even though she set up an out-of-office email explaining that she was not in the office.

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

### CONTENTIONS ON APPEAL

Complainant did not submit a statement or brief in support of her appeal. The Agency submitted a brief in opposition, arguing that it properly dismissed her complaint.

### STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as

true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

### ANALYSIS

The regulation set forth 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an Agency shall dismiss a complaint which fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.106, which, in turn, requires the filing of a formal complaint within 15 days of receiving notice of the right to do so.

The record shows that on January 29, 2024, the EEO Counselor sent Complainant an email at 3:25 pm accompanied with a Notice of Right to File an EEO Complaint (Notice), notifying her that she had 15 calendar days from the date of receiving the Notice to file a formal complaint. The EEO Counselor asked Complainant to acknowledge receipt of the Notice. Complainant replied to the email at 3:53 pm the same day, acknowledging receipt, therefore she had until February 13, 2024, to file her complaint within the 15-day limitation period. However, Complainant did not file her formal complaint until February 16, 2024, consequently her complaint was filed late.

The EEO Case Manager emailed Complainant to find out if there was a reason for her untimely filing. In her reply email, Complainant did not contend that the Agency failed to notify her of the 15-day limit. Further, she did not dispute that her complaint was filed late. Instead, she wrote, "I received my paperwork on January 29, 2024, thinking I had 15 business days to file." Complainant then stated, "please understand at the time, I was under undue stress."

Complainant's mistaken assumption of the deadline is not sufficient to relieve her of her duty to file her complaint on time. See DeJesus v. Dep't of Veterans Affairs, EEOC Appeal No. 0120113671 (Nov. 21, 2012) (where there was no evidence that the complainant attempted to resolve her confusion regarding 15 day time limit before expiration the Agency's dismissal was upheld); Tate v. Dep't of Navyt of Navy, EEOC Appeal No. 01842218 (Jan. 28, 1985) (the complainant's mistaken interpretation of time limit was not sufficient to extend the time limit). To the extent that she asserted that she was stressed, we have consistently held that in cases involving mental or physical health difficulties, an extension is warranted where an individual is so incapacitated by her condition that she is unable to

meet regulatory time limits. See Crear v. U.S. Postal Serv., EEOC Request No. 05920700 (Oct. 29, 1992). However, in this case Complainant failed to provide medical evidence demonstrating incapacitation. Since Complainant has failed to provide adequate justification for extending or tolling the time limit, we find that her complaint was properly dismissed as untimely raised.

### CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC

20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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

November 27, 2024

Date