



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

[REDACTED]  
Ambrose M.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2019000257

Hearing No. 510-2016-00092X

Agency No. 200I-0546-2016104884

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final action dated August 30, 2018, implementing the August 14, 2018 decision of an Administrative Judge (AJ) dismissing a formal 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.

**BACKGROUND**

During the period at issue, Complainant worked for the Agency as a Police Officer in Miami, Florida.

On June 2, 2016, Complainant contacted the Agency's Office of Resolution Management (ORM) automated service. Via email on that same day, ORM told Complainant that its email was in response to Complainant's June 2, 2016 contact, in which he initiated an informal EEO complaint. The email contained numerous documents including the pre-complaint counseling form.

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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.

The email informed Complainant to return the signed documents within 5 days and that failure to do so could result in receiving a Notice of Closure for failure to pursue the complaint.<sup>2</sup>

On December 6, 2016, Complainant filed a formal EEO complaint alleging that the Agency subjected him to discrimination based on race (African-American) and color (black). By letter dated February 24, 2017, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following claims:

1. On May 27, 2016, the Agency removed Complainant from the Agency Law Enforcement Training Center, and
2. On June 2, 2016, Complainant was terminated during his probationary period.<sup>3</sup>

Upon completion of the investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ).

On May 2, 2018, the AJ issued an Order on Initial Conference setting forth that there was an issue of whether Complainant timely initiated EEO contact. The AJ ordered the Agency to file a Motion to Dismiss by May 16, 2018 and Complainant to file a response by May 30, 2018.

The AJ issued an Order dated August 14, 2018 dismissing the formal complaint for untimely EEO Counselor contact. The AJ acknowledged that Complainant made a telephone inquiry through the Agency's ORM automated answering service. The AJ did not find that Complainant's telephone call to ORM constituted initial EEO contact. The AJ noted that Complainant provided, during the automated call, information so that a package of documentation could be provided to Complainant, which needed to be returned to the Agency within 5 days. The AJ reasoned that, "Complainant has not demonstrated that he provided the completed documentation to commence the EEO process in either time frames provided by the June 2, 2016 letter or the 45-day time limit provided by the regulations."<sup>4</sup> AJ Decision at 2.

The AJ stated that Complainant had asserted that he expressly mailed the documentation and that the Agency received it on June 3, 2016. However, the AJ stated that "[t]he receipts and information provided which purport to establish that Complainant sent the documentation to begin the EEO process are missing some critical elements. To begin with, the exhibits are barely legible and in some areas not at all.

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<sup>2</sup> The record is devoid of evidence that the Agency ever sent Complainant a Notice of Closure.

<sup>3</sup> The record reflects that the effective date of Complainant's termination is June 16, 2016.

<sup>4</sup> The AJ, in his decision, noted that, "[t]he Agency's process causes concern as it may, depending on the circumstances, either lengthen or shorten the 45-day time limit for contacting an EEO Counselor. In this case Complainant has met neither time frame. A review of the Agency's process is therefore not necessitated." AJ Decision at 2.

There is no visible information as to what was being sent or who was sending it...All this exhibit establishes is that something was sent to the Agency's ORM office on June 2, 2016 which was received the next day. The Agency has no record of receiving any documentation from Complainant on that day." AJ Decision 2. The AJ found that Complainant submitted the documentation on August 17, 2016 and thus his EEO contact was not timely.

On August 30, 2018, the Agency issued a final action implementing the AJ's decision dismissing Complainant's complaint.

The instant appeal followed. On appeal, Complainant, through his attorney, asserts that he contacted ORM on June 2, 2016, through the Agency's automated telephone service which is how one must initiate EEO counseling.<sup>5</sup> Complainant further asserts that he went to the post office and mailed ORM's requested documents on June 6, 2016, which was received by the Agency on June 7, 2016.<sup>6</sup> Complainant, through his attorney, asserts that the Agency's supplemental counseling forms and the five-day response period are not required by Commission's regulations. Complainant also submits a bank statement reflecting that he was charged a specific amount from the Postal Service on June 6, 2016 (the date Complainant asserts that he mailed the ORM documentation) and that this charged amount was the same amount reflected on the postage receipt he submits for June 6, 2016.

In response, the Agency requests that we affirm the AJ's decision dismissing Complainant's complaint. The Agency reiterates arguments previously raised.

### 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.

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<sup>5</sup> Complainant subsequently retained an attorney on August 17, 2016.

<sup>6</sup> Complainant's attorney asserts that dates in the AJ's decision listing that Complainant asserted that he mailed the documents on June 2, 2016 is an error.

Here, we conclude the AJ improperly dismissed Complainant's complaint for untimely EEO Counselor contact. Specifically, the AJ erred in finding that Complainant's telephone call on June 2, 2016, to the Agency's ORM did not constitute timely initial EEO counseling contact. The Commission has held that in order to establish EEO Counselor contact, an individual must contact an agency official logically connected to the EEO process and exhibit an intent to begin the EEO process. Allen v. United States Postal Service, EEOC Request No. 05950933 (July 9, 1996). The record contains a copy of the termination letter from the Agency to Complainant dated June 2, 2016. Therein, the letter provided that if Complainant believed he had been subjected to discrimination, he could file a discrimination complaint by "contacting the Office of Resolution Management (ORM) at [a specified phone number]." In addition, the record contains documentation attached to the Agency's Motion to Dismiss reflecting that Complainant attended a Prevention of Workplace Harassment/No Fear training. The Agency provided a copy of the training module attached to its Motion to Dismiss. The training module informs employees to initiate EEO Counselor contact within 45 days by contacting ORM in person or by calling a specified phone number (the same phone number referenced in the termination letter sent to Complainant).

Moreover, the record contains documentation from the Agency acknowledging that Complainant contacted the ORM phone number specified in the termination letter and the training module on June 2, 2016. Specifically, the record contains a signed declaration from the Agency's EEO Southeast District Manager for ORM (M1). Therein, M1 states that in June 2016, ORM utilized a centralized intake process which was contracted through the Defense Logistics Agency (DLA). M1 states that the primary method used by employees to contact ORM was through a specified telephone number. We note that this telephone number was the same number set forth in Complainant's termination letter and the training module. M1 further asserts that the automated system would obtain basic information from the caller which would then generate a package of EEO documents. M1 states that callers were instructed to complete the documents within 5 days of receipt. M1 states that Complainant did contact the ORM automated service on June 2, 2016.<sup>7</sup>

Under these specific circumstances, we find that Complainant initiated EEO contact on June 2, 2016 when he called the ORM automated service. Complainant contacted the phone number set forth in the termination letter and the training module. The termination letter and training module indicated that this telephone number was to initiate the EEO process. Based on the foregoing, we find that Complainant contacted someone logically connected to the EEO process and exhibited an intent to begin the EEO process when he contacted ORM's automated service on June 2, 2016. Because we find Complainant initiated EEO contact on June 2, 2016, Complainant's EEO contact is timely. We expressly note that the AJ's analysis should have stopped at this point. We need not address the AJ's/Agency's argument that Complainant did not submit the documentation until August 17, 2016, because we find that Complainant initiated EEO contact with ORM via his June 2, 2016 telephone call.

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<sup>7</sup> M1 states that Complainant submitted the package of documents on August 17, 2016.

We note that the Agency's June 2, 2016 email indicating that Complainant had 5 days to complete and return documentation to initiate the EEO process and speak with an EEO Counselor (after Complainant had already contacted ORM via phone) *placed an additional requirement* on Complainant to initiate the EEO process than that set forth in the Commission's regulations.

We REVERSE the Agency's final action implementing the AJ's decision dismissing Complainant's complaint and we REMAND this matter for a hearing in accordance with the ORDER below.

### ORDER

Within 15 calendar days of the date this decision is issued, the Agency shall submit a renewed request for a hearing, a copy of this appellate decision, and the complaint file to the Hearings Unit of the EEOC's Miami District Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

### 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 C.F.R. § 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

April 24, 2020  
Date