



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]

Wilfredo M.,<sup>1</sup>  
Complainant,

v.

Janet L. Yellen,  
Secretary,  
Department of the Treasury  
(Internal Revenue Service),  
Agency.

Appeal No. 2020001922

Agency No. IRS-20-0044-F

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated November 22, 2019, dismissing 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. For the following reasons, the Commission AFFIRMS the Agency's decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was a former employee of the Agency who had previously worked as a GS-1811-12 Special Agent in Los Angeles, California.

On October 15, 2019, Complainant initiated contact with an EEO Counselor. On November 17, 2019, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Latino/Hispanic), age (born in November 1961), and reprisal for prior protected EEO activity (prior EEO complaint) when the Agency's payroll servicer, the National Finance Center (NFC),<sup>2</sup> issued his 2017 W-2 with significant errors.

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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.

<sup>2</sup> The NFC is part of another agency, the Department of Agriculture.

Complainant also noted that, after the W-2 was corrected, the Internal Revenue Service (IRS) disallowed another deduction. As a result of the correction, Complainant, as a taxpayer, incurred additional tax consequences. He contacted an IRS Examiner as a taxpayer in order to rectify the situation through the tax process. As a result of the tax review process, Complainant was assessed an additional \$20,000 in taxes. Complainant noted that he engaged the Office of the Taxpayer and spoke to a Taxpayer Advocate seeking assistance regarding his tax consequences. Complainant believed that the Taxpayer Advocate and the IRS Examiner did not properly handle his taxpayer issues. He claimed, without specificity, that they failed to assist him because they learned of his prior EEO activity against the Agency.

The Agency issued a final decision, dismissing Complainant's complaint for two reasons: (1) pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim as a collateral attack on the NFC payroll process and on the tax adjudication process; and (2) pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact. According to the Agency, because Complainant did not contact an EEO Counselor within 45 days of receiving the W-2 that contained the errors, his EEO Counselor contact was not timely.

The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant contends that, when he first received his 2017 W-2, he had no reason to suspect discrimination. According to Complainant, once he discovered the issue with his 2017 W-2, obtaining a corrected W-2 required extensive contact with the Agency and the NFC and even the involvement of his congressional representative. Complainant notes that, after a corrected W-2 was issued, the Agency's tax examination process scrutinized another issue with his taxes, resulting in tax liability of \$20,000. Complainant also avers that the Agency's Office of the Taxpayer Advocate refused to help him with the tax examination. According to Complainant, his EEO Counselor contact was timely because it was within 45 days of contact with the Agency regarding his tax examination.

In response to Complainant's appeal, the Agency contends that Complainant's complaint fails to state a claim and that Complainant failed to timely contact an EEO Counselor, noting that federal law required the Agency to issue Complainant his W-2 for 2017, no later than January 31, 2018, and that he did not contact an EEO Counselor for more than 21 months.

### ANALYSIS AND FINDINGS

The Agency dismissed Complainant's EEO complaint for untimely EEO Counselor contact. EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105, §1614.106 and §1614.204(c), unless the Agency extends the time limits in accordance with §1614.604(c). EEOC Regulation 29 C.F.R. §1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO Counselor within 45 days of the date of the

matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. EEOC Regulation 29 C.F.R. §1614.105(a)(2) allows the Agency or the Commission to extend the time limit if Complainant can establish that Complainant was not aware of the time limit, that Complainant did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence Complainant was prevented by circumstances beyond his control from contacting the EEO Counselor within the time limit, or for other reasons considered sufficient by the Agency or Commission.

We agree with Complainant that the Agency's final decision incorrectly stated that he needed to contact an EEO Counselor within 45 days of receiving the initial W-2 in or around January 2018. At the time, Complainant would have not necessarily known that there was a problem with his 2017 W-2 or had reason to suspect discrimination related to the issuance of his W-2. However, it is clear that Complainant was aware of the problems with the 2017 W-2 when he incurred \$20,000 in tax consequences. Then, Complainant, as a taxpayer, contacted the IRS Examiner and Taxpayer Advocate in order to resolve the issues through the taxpayer processes. Therefore, to the extent Complainant alleged discrimination with regard to the 2017 W-2, we find that Complainant's EEO Counselor contact did not occur within 45 calendar days. In reaching this finding, we note that the Commission has consistently held that use of internal agency procedures, such as union grievances, and other remedial processes does not toll the time limit for contacting an EEO Counselor. See Kramer v. U.S. Postal Serv., EEOC Appeal No. 01954021 (Oct. 5, 1995); Williams v. U.S. Postal Serv., EEOC Request No. 05910291 (Apr. 25, 1991); Ellis v. U.S. Postal Serv., EEOC Request No. 01992093 (Nov. 29, 2000). Therefore, to the extent Complainant is alleging discrimination with respect to his 2017 W-2, we find that such a claim was not timely raised with the EEO Counselor and the Agency's dismissal was appropriate pursuant to 29 C.F.R. § 1614.107(a)(2).

Furthermore, a fair reading of the formal complaint reveals that Complainant also alleged that he was subjected to retaliation with regard to actions taken by officials within the Agency such as the IRS Tax Examiner and the Taxpayer Advocate. This allegation also fails to state a claim.

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age, disabling condition, genetic information, or reprisal. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993).

Here, we find that Complainant was not only challenging the 2017 W-2 but also the series of events that occurred following the correction of the 2017 W-2. We note that this included an increase in his tax liability and his attempts to resolve his tax problems through the IRS tax resolution process. We find that these actions occurred to Complainant as a taxpayer and that his contact with IRS officials was as a taxpayer attempting to address his tax issues, not as a former employee of the Agency. It was only after the tax resolution process failed to resolve his tax issues to his satisfaction that he contacted the EEO Counselor. The proper forum for Complainant to have raised his challenges to actions occurring during the tax resolution process was during the tax resolution process.. It is inappropriate to now attempt to use the EEO process to collaterally attack actions which occurred during the tax resolution process.

### CONCLUSION

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

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her 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 his or her 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(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

May 24, 2021  
Date