



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

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

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs  
(Veterans Benefits Administration),  
Agency.

Appeal No. 2021001757

Agency No. 200J03312020105574

**DECISION**

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), from the Agency’s November 9, 2020 dismissal of her equal employment opportunity (“EEO”) complaint alleging violations of Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (“ADEA”), as amended, 29 U.S.C. § 621 et seq. and the Equal Pay Act of 1963 (“Equal Pay Act”), as amended, 29 U.S.C. § 206(d) et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Veterans Service Representative (“VSR”), GS-10, at the St. Louis VA Regional Office (“VARO”) and Records Management Center in Overland, Missouri.

On September 2, 2020, Complainant filed a formal EEO complaint alleging that the Agency subjected her discrimination and a hostile work environment/harassment on the bases of race (African-American), color (Black), sex (female), disability, age (over 40) and reprisal (prior protected EEO activity) when:

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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.

- a) Since August 17, 2017, she has been discouraged from applying for a promotion,<sup>2</sup>
- b) Since June 4, 2020, she has been threatened with reassignment to her original Coach,
- c) On various dates she experienced the following discrete acts:
  - 1) Since August 17, 2017, she was assigned combined duties of both Pre- VSR and Post-VSR positions,
  - 2) Since August 17, 2017, she has not been paid at a level commensurate with duties assigned,
  - 3) On unspecified dates, since August 17, 2017, she has been forced to use leave to avoid and recover from her hostile work environment,
  - 4) On or about December 18, 2017, she was passed-over for applying for promotion/reassignment to the Appeals Team,
  - 5) On or about October 25, 2018, she was passed-over for applying for promotion/reassignment to the Appeals Team,
  - 6) On or about September 3, 2019, her training standard was changed,
  - 7) On June 4, 2020, her request for promotion was denied,
  - 8) On or about June 4, 2020, her title was changed, and,
  - 9) On June 4, 2020, her request for back-pay was denied.
  - 10) On October 11, 2020, she was reassigned,
  - 11) On an unspecified date, her standards were changed,
  - 12) On an unspecified date, she was assigned “useless” training.

On September 15, 2020 the Office of Resolution Management (“ORM”) Case Manager (“CM”) for Complainant’s EEO Complaint emailed a Request for Information (“RFI”) to Complainant and her nonlegal representative (“NLR”), with a detailed list of questions and document requests.

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<sup>2</sup> Complainant alleges that the ongoing harassment and pay disparity began in 2014, and she raised these claims in another EEO complaint that was accepted for adjudication in August 17, 2017 (Agency No. 200J03312017101021), so the Agency properly excluded the dates these ongoing claims were already adjudicated.

The RFI explained that the information was due within 15 days (September 30, 2020), and warned that failure to provide the information in time “could result in the complaint being dismissed in accordance with EEOC 29 C.F.R. §1614.107(a)(7).” Complainant timely submitted a thorough response with supporting documentation to CM a week under deadline.

On September 22, 2020, the Agency issued a “Notice of Partial Acceptance,” where it accepted Claims (a), (b), and (c)(1)-(3), for investigation as a timely raised harassment/hostile work environment claim. Claims (c)(1)-(3) were also accepted for investigation as individual claims because they alleged discrete acts. The Notice dismissed Claims (c)(4)-(9) for untimely contact with an EEO Counselor pursuant to 29 C.F.R. §1614.107(a)(2).

On October 21, 2020, Complainant submitted Claims (c)(10)-(12) as an amendment to her complaint. In a separate email, Complainant contacted CM and requested official time. On October 23, 2020, CM issued Complainant a new RFI for three documents: “(1) document showing the date on which she was reassigned effective October 11, 2020, (2) document showing the date on which her standards were changed, and (3) document showing the date on which she was assigned useless training.” The request notified Complainant that the documents were due within 15 days, and that submissions after the deadline could result in the dismissal of her complaint, under 29 C.F.R. §1614.107(a)(7). Complainant asked CM for Official Time, and CM explained that ORM did not process such requests, and directed her to the EEO Program Manager (“PM”). CM’s response also reiterated the 15-day limitation period continued to apply.

On November 9, 2020, the Agency issued a “Notice of Amendment Decision and Dismissal.” The Agency accepted Complainant’s amendment (Claims (c)(10)-(12)) as separate claims “like or related” to the instant complaint. However, the Agency determined that the documents were submitted three days after the October 23, 2020 RFI deadline, the Agency dismissed Complainant’s claim in its entirety for failure to cooperate, pursuant to 29 C.F.R. §1614.107(a)(7).

The instant appeal followed.

## ANALYSIS

### *Failure to Cooperate*

The regulation set forth under 29 C.F.R. § 1614.107(a)(7) provides for the dismissal of a complaint where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within fifteen days of its receipt, or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. In the instant case, the alleged failure to cooperate arises from Complainant’s allegedly delayed response to the Agency’s October 23, 2020 RFI.

Where, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Guy, v. Dep't of Energy, EEOC Request No. 05930703 (Jan. 4, 1994) (quoting Williams v. Dep't of Defense, EEOC Request No. 05920506 (Aug. 25, 1992)). In addition, in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decisions." See also Gens v. Dep't of Def., EEOC Request No. 05910837 (Jan. 31, 1992).

The Commission's regulations provide that when a filing deadline falls on a weekend or federal holiday, the deadline will be moved to the next business day. See, e.g. Mario K. v. United States Postal Serv., EEOC Appeal No. 0120180334 (Feb. 15, 2018) (formal complaint was deemed timely filed on Tuesday September 5, 2017, because the date the filing period ended, Monday, September 4, 2017, was a federal holiday). Moreover, if Complainant opted to respond by mail, our regulations provide an additional five days beyond the expiration of the time limit, for delivery, pursuant to 29 C.F.R. §1614.604(b).

Emails in the record demonstrate that Complainant and NLR were on notice of the 15 day time limit to respond to the Agency's October 23, 2020, RFI, and the consequences for failure to do so. The record further reveals that 15 days from October 23, 2020, was November 7, 2020, which the Agency identified as a Friday. However, November 7, 2020, fell on a Saturday, which meant that the deadline to respond fell on the next business day, Monday, November 9, 2020.

Given that the Agency's November 9, 2020 FAD cut short Complainant's opportunity to timely respond to the October 23, 2020 RFI, the Agency's decision to dismiss Complainant's entire complaint because Complainant failed to cooperate in this matter is unsupported.

#### *Amendment Request - Claims (c)(10 - 12)*

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint which raises a matter that has not been brought to the attention of an EEO Counselor, and is not like or related to a matter on which the complainant has received counseling. A later claim or complaint is "like or related" to the original complaint if the later claim or complaint adds to or clarifies the original complaint and could have reasonably been expected to grow out of the original complaint during the investigation. See Hurlocker v. Dep't of Veterans Affairs, EEOC Appeal No. 0120141346 (Jun. 27, 2014), referencing Scher v. United States Postal Serv., EEOC Request No. 05940702 (May 30, 1995).

Claims (c)(10, 11, and 12) are sufficiently "like or related" to the claims in Complainant's existing (September 2, 2020) complaint, to be included as amendments. All of the claims relate to Complainant's concerns about her workload, assignments, and coach, and the amendments could have reasonably been expected to grow out of the original complaint during investigation.

*Untimely EEO Contact - Claims (c)( 4-9)*

The regulation set forth under 29 C.F.R. §1614.107(a)(2) states, in relevant part, 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. Under §1614.105(a)(1), an aggrieved person must initiate contact with an EEOC 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. Under 29 C.F.R. §1614.105(a)(2), an agency or the Commission may extend the time limit if the complainant establishes that he or she was not aware of the time limit, did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the EEO Counselor within the time limit, or for other reasons considered sufficient by the agency or Commission.

The Commission has consistently held that a complainant who has engaged in prior EEO activity is deemed aware of the time frames required for filing complaints in the EEO procedure. See Williams v. Dep't of Homeland Sec., EEOC Appeal No. 0120111236 (Oct. 4, 2011) citing Coffey v. Dep't. of the Navy, EEOC Request No. 05901006 (Nov. 16, 1990), see also Kader v. United States Postal Serv., EEOC Request No. 05980473 (Jun. 24, 1999).

Complainant initiated EEO contact on August 4, 2020. The allegations in Claims (c)(4, 5, 6, 7, 8, and 9) were all discrete acts, so the limitation period to initiate contact was triggered at the time they occurred. Complainant has not provided any acceptable explanation for the delay in making EEO contact with respect to the alleged discriminatory acts in these claims, which all occurred outside the 45-day limitation period. The Agency properly dismissed these claims as untimely raised with an EEO counselor.

*Official Time*

Agencies are required to provide official time in accordance with 29 C.F.R. § 1614.605(b), which states, “employees shall have a reasonable amount of official time, if otherwise on duty, to prepare their complaints and respond to requests for information.” Agencies must establish a process for deciding how much official time to provide. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (“EEO MD-110”), at Chap. 6 Pt. C (Aug. 5, 2015). Agencies must further inform complainants and their representatives of the process and how to claim or request official time. *Id.*

If the agency denies a request for official time, either in whole or in part, it must include a written statement in the complaint file noting the reasons for the denial. If the agency’s denial of official time is made before the complaint is filed, the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant’s subsequently files a complaint. *Id.*

The Commission has held that it has the authority to remedy a violation of 29 C.F.R. § 1614.605 without a finding of discrimination. The Commission has held that such a claim should not be processed in accordance with 29 C.F.R. § 1614.108 since the focus is not on the motivation, but rather the justification on why the complainant was denied a reasonable amount of official time.

From the record, the Agency does not appear to fully meet its obligation to inform Complainant about her right to official time and how to request it. Complainant's personal statement in response to the September 15, 2020 RFI notified CM and the 15-day time frame was "extremely limiting" because, among other things, she had to make document requests during work hours, yet she was not granted time to work on her complaint. She reiterated this difficulty on appeal. With respect to the October 21, 2020 email exchange between CM and Complainant, there appears to be a communication disconnect on the next steps for obtaining official time. The Agency did not offer any standard directions on the official time process for complainants.

In a November 28, 2020 Addendum provided to the case file by NLR, Complainant essentially claims that she was denied official time to work on a response to the Agency's October 23, 2020 RFI. The Addendum recounts that CM "alleged that he coordinated with [PM] to initiate her request for official time to respond to [CM] request for additional time," yet PM never contacted Complainant's supervisors to arrange official time. Complainant acknowledges that she took no further action, stating that she had been "patiently waiting" to be granted official time before responding to the RFI. Additionally, NLR explains that he was incapacitated with Covid-19, so he was unable to assist Complainant with obtaining official time.<sup>3</sup> Complainant concludes that neither the Agency nor CM "ensured her right to official time was granted."

The Agency responds on appeal that Complainant's assertion that she requested official time is "fraudulent." The Agency provides signed affidavits from Complainant's supervisors and other relevant management officials confirming that official time had not been requested by or for Complainant during the 15-day response period. Significantly, Complainant never informed CM that she was awaiting a response regarding official time or requested an extension. Yet, the record reflects that on October 21, 2020, Complainant emailed CM, stating, "It has been brought to my attention that I would need to request official time in order to provide you with the requested Information," and directs all further correspondence to NLR. Contrary to the conversation Complainant recounted, CM's email response is devoid of any indication that CM would take further action, and states that his office does not handle requests for official time, instead directing Complainant to PM. It appears nobody, including Complainant, followed up.

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<sup>3</sup> We are not convinced that Complainant "dishonestly represented" that NLR was incapacitated with Covid-19 throughout the response time frame, NLR provided the dates of hospitalization, not incapacitation, and there is no evidence that Complainant knew or should have known about NLR's invocations of Covid-19 to obtain extensions in unrelated EEO complaints.

We remind the Agency that Complainant is not accountable for NLR's conduct in other forums, representing other Agency employees. That said, we remind Complainant that at all times, the complainant in an EEO action is responsible for proceeding the complaint whether or not a representative has been designated. See 29 C.F.R. §1614.605(e).

### CONCLUSION

The Agency's dismissal of Complainant's complaint for failure to cooperate is REVERSED.

The Agency's dismissal of Claims (c)(4) – (9) for untimely EEO contact is AFFIRMED.

We hereby REMAND Claims (a), (b), and (c)(1, 2, 3, 10, 11, and 12) for further processing in accordance with the following Order.

### ORDER (E0618)

The Agency is ordered to process Claims (a), (b), and (c)(1, 2, 3, 10, 11, and 12) in accordance with 29 C.F.R. § 1614.108. 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 C.F.R. § 1614.503(f) for enforcement by that agency.

#### 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

June 2, 2021

Date