



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Erik S.,<sup>1</sup>  
Complainant,

v.

Frank Kendall,  
Secretary,  
Department of the Air Force,  
Agency.

Appeal No. 2022000848

Agency No. 8LIM2100432

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated October 26, 2021, dismissing his complaint alleging 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., 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was an applicant for employment with the Agency as an Equal Employment Manager, NH-0260-03, at the Agency's Hill Air Force Base in Utah.

On September 23, 2021, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Hispanic), national origin (Peru), color (Brown), disability, and age (60) when the Agency rescinded a job offer indicating he had failed to meet the pre-employment requirements after becoming aware of his disability through his submission of a Schedule A, witnessed him limping, and hearing his heavy accent.

---

<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 Agency dismissed this claim, pursuant to 29 C.F.R. § 1614.107(a)(2), for failure to comply with the applicable time limits, asserting Complainant failed to file his formal complaint in a timely manner. The Agency also noted 29 C.F.R. § 1614.107(a)(6), referencing a complainant that cannot be located.

Complainant filed the instant appeal. On appeal, Complainant contends he could not promptly respond to the Agency-issued Notice of Right to File a Formal Complaint (“NORF”) because he was in Peru. He also contends the NORF was signed for by the postal service and he picked it up a few weeks later due to being out of town. At the time of his late filing, Complainant also stated that his mental and physical health have suffered due to a false accusation and this has affected his ability to focus and concentrate. He states that due to a lack of insurance, he cannot visit a doctor or mental health specialists. He contends the withdrawn job offer has further deteriorated his health. He also states he cares for his mother with dementia, and that he had to travel to Peru because his stepmother has cancer and his father was seriously ill.

The Agency responds by noting Complainant received the NORF at his address of record and had 13 days prior to leaving the country to file a complaint. They also note Complainant waited 13 days after returning to the country to file his complaint despite receiving notice that his case was being closed since he had not filed a complaint. They state Complainant has not provided sufficient evidence to support tolling his deadline to file.

### ANALYSIS AND FINDINGS

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) provides, in relevant part, that an agency shall dismiss a complaint that fails to comply with the applicable time limits. A formal “complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f).” (29 C.F.R. § 1614.106(b)). The notice required by 29 C.F.R. § 1614.105 (d) “shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.”

We find that the Agency has established that the complaint was untimely filed. A certified mail receipt shows the NORF was received at Complainant’s address of record on August 6, 2021. The NORF specifically states that Complainant had “the right to file a FORMAL COMPLAINT OF DISCRIMINATION WITHIN 15 CALENDAR DAYS AFTER RECEIPT OF THIS NOTICE [29 CFR. Part 1614.105(d)].” Thus, in order to be considered timely, Complainant needed to file his formal complaint on or before August 23, 2021.<sup>2</sup> The record reflects Complainant filed his formal complaint of discrimination by email to the Agency on September 23, 2021, a month after the deadline for filing.

---

<sup>2</sup> 29 C.F.R. § 1614.604(d) extends a deadline that falls on a Saturday, Sunday, or Federal holiday to the next business day. Fifteen calendar days after August 6, 2021 falls on Saturday, August 21, 2021. Therefore, the deadline was Monday, August 23, 2021.

Complainant argues this delay should be excused because he could not respond promptly due to being out of town. He also states that due to being out of town, he did not receive the NORF until he picked up his mail a few weeks later. However, the documentation provided by Complainant showed he left Utah for Peru on August 19, 2021 and returned on September 10, 2021, giving him thirteen days to respond to the NORF before leaving the country. He waited an additional 13 days after arriving back in Utah to file his complaint.

Although Complainant argues his health and family responsibilities prevented his timely filing, we have consistently held, in cases involving physical or mental health difficulties, that an extension is warranted only where an individual is so incapacitated by his condition that he is unable to meet the regulatory time limits. See Davis v. U.S. Postal Serv., EEOC Request No. 05980475 (August 6, 1998). Claims of incapacity must be supported by medical evidence of incapacity. See Crear v. U.S. Postal Serv., EEOC Request No. 05920700 (Oct. 29, 1992) (complaints of decreased mental and physical capacity, without medical evidence of incapacity, does not warrant extension of time limits). Complainant states he does not have insurance and therefore could not see a doctor, but we find that his ability to care for his ailing parents and travel out of the country shows that he was not incapacitated.

Complainant has not provided sufficient justification to warrant tolling of the time limits. His formal complaint was not timely filed. As such, the Agency correctly dismissed the complaint.<sup>3</sup>

### CONCLUSION

For the foregoing reasons, the Agency's final decision dismissing the 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.**

---

<sup>3</sup> Because we find the complaint was not timely filed, we need not discuss whether the Agency was correct in its application of 29 C.F.R. § 1614.107(a)(6).

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:



---

Carlton M. Hadden, Director  
Office of Federal Operations

May 4, 2022  
Date