



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

[REDACTED]  
Willa B.,<sup>1</sup>  
Complainant,

v.

Xavier Becerra,  
Secretary,  
Department of Health and Human Services  
(Centers for Medicare and Medicaid Services),  
Agency.

Appeal No. 2022001513

Agency No. HHSCMS02632021

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated December 13, 2021, 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., 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. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was employed by the Agency as an IT Specialist, GS-13, for the Division of Compliance Projects & Demonstrations, within the Provider Compliance Group (“PCG”) for the Agency’s Center for Program Integrity in Baltimore, Maryland.

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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.

On August 10, 2021, Complainant filed an EEO complaint alleging discrimination on the bases of race (African American), sex (female), disability (major neurocognitive disorder, traumatic brain injury), age (49), and reprisal for prior protected EEO activity when:

1. Since October 1, 2020, she has not been provided with an appropriate reasonable accommodation;
2. Since October 1, 2020, she has been required to perform Contract Officer's Representative ("COR") training as part of her duties;
3. On January 20, 2021, she was issued a Performance Management Appraisal Program ("PMAP") summary rating of 3.30;
4. In March 2021, her role was changed to Business Function Lead;
5. On April 30, 2021, she was issued a Performance Counseling Memorandum,
6. On April 30, 2021, her IT rotation in the Center for Consumer Information and Insurance Oversight ("CCIO"), scheduled for May 10, 2021 was denied;
7. On April 30, 2021, her request for a flexible 10.5-hour work schedule was denied; and,
8. On April 30, 2021, her within grade increase ("WIGI") was denied.

The Agency dismissed the complaint as untimely filed, pursuant to 29 C.F.R. § 1614.107(a)(2). Additionally, the Agency dismissed claim 3 on the grounds of untimely EEO counselor contact.

The instant appeal followed.

### ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. §1614.107(a)(2) 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, §1614.106 and §1614.204(c), unless the agency extends the time limits in accordance with §1614.604(c).

#### *Untimely Filed Complaint*

The regulation set forth under 29 C.F.R. §1614.106(b) requires the filing of a written complaint with the agency that allegedly discriminated against the complainant within 15 calendar days after the date of receipt of the Notice of Right to File an Individual Complaint ("Notice"). A complaint is deemed timely if it is received or postmarked before the expiration of the applicable filing period, or in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. §1614.604(b).

This time limit may be extended, as it is subject to waiver, estoppel, and equitable tolling in accordance with 29 C.F.R. §1614.604(c).

The record reflects that Complainant received a Notice on July 27, 2021. Therefore, in order to be timely, the complaint needed to be filed by August 11, 2021. The Notice instructed Complainant to complete the enclosed "Formal Individual Complaint Form for Employment Discrimination" ("complaint form") and "return it to the following *address*: Director, Office of Equal Opportunity and Civil Rights ["OEOCR"], Centers for Medicare & Medicaid Services ["CMS"]" (emphasis added), followed by an email address and fax number. The complaint form instructions provided the same information and stated that Complainant "may submit this form by email or by fax." Both documents, including the letterhead and signature block for the EEO Counselor that issued the Notice, were devoid of a physical mailing address for OEOCR.

However, both the Notice and the complaint form indicated that a complaint would be accepted if filed by mail, stating: "[a] complaint shall be deemed timely if it is received *or postmarked* before the expiration of the 15 calendar day filing period, or in the absence of a legible postmark, *if it is received by mail* within five calendar days of the expiration of the filing period" (emphasis added). See 29 C.F.R. § 1614.604(b). Moreover, we note that the Notice package itself was delivered to Complainant via certified mail.

The record reflects that, on August 9, 2021, Complainant sent her formal complaint via overnight certified mail to the street address for OEOCR, and the recipient, "CMS, Director, Office of Civil Rights." Thereafter, she received a certified return receipt card evidencing that her complaint was received on August 10, 2021.<sup>2</sup>

Meanwhile, Complainant and her attorney, who she designated as her representative on August 4, 2021, were in regular contact with OEOCR in an effort to reach a settlement.<sup>3</sup>

On August 12, 2021, the Agency informed Complainant that it had not received her complaint. Complainant's attorney responded, on August 27, 2021, explaining that Complainant had filed the complaint herself. Days later, the Agency sought more details from Complainant regarding the mailing, after confirming that its mail room did not have the complaint. When the Agency did not receive a response to its request for additional information, on an unspecified date in September 2021, it closed Complainant's case file.

On September 27, 2021, Complainant emailed the Agency asking for the status of her complaint.<sup>4</sup>

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<sup>2</sup> The card included an illegible signature, and no printed name was provided.

<sup>3</sup> These efforts ceased on September 10, 2021 when Complainant declined the Agency's final offer.

<sup>4</sup> Complainant expressed that she was "confused because it was sent to CMS, Office of Civil rights, but [her union representative] signed for it at the central office.... I am not sure why no

As the Agency had claimed to have not yet received her complaint, Complainant emailed a scanned copy of it, along with the documentation reflecting the August 10, 2021 delivery.

While Complainant contends that her complaint was timely filed on August 10, 2021, the Agency maintains that it was not filed until September 27, 2021. The Agency argues that the August 10, 2021 submission was not properly filed because it was addressed to an office that “did not exist” within the Agency and lacked a specific office number (mailstop). Citing Pacheco v. United States Postal Serv., EEOC Request No. 05930700 (Sept. 10, 1993), the Agency reasons that, the Commission has repeatedly held that “when provided with the proper address, filing at the wrong address does not constitute a proper filing.” The Agency likens Complainant’s failure include an office number (mail stop) on the address to instances where a complaint was found to be untimely filed when the complainant committed a “minor clerical error” causing the complaint to be delivered to the wrong post office box or where a complainant attempted to fax their formal complaint but used the wrong number. Citing Complainant v. Dep’t of the Navy, EEOC Appeal No. 0120151146 (July 8, 2015) and Complainant v. Dep’t of Treas., EEOC Appeal No. 0120150069 (Feb. 6, 2015).

However, the Commission finds that neither example applies here, as they involve error by complainants, in transcribing or dialing a number that the Agency correctly provided to them, which resulted in non-delivery. Here the Notice and complaint form did not provide an address for filing the complaint, despite references to “receipt by mail” and “postmark”. However, the Agency acknowledges that the street address, including mail stop, for the Director and OEOCR can be found on the Agency website, EEO posters, and under “most EEO staff email signatures.” Complainant utilized the correct address, and the omission of a mailstop did not prevent delivery of the complaint to a central mailroom that received other mail for OEOCR. While it is unclear why the complaint was given to the union representative, the record reflects that the recipient identified on the certified mail receipt for the complaint was the “CMS, Director, Office of Civil Rights.”

Additionally, the Agency’s assertion, that it left the mailing address off of the Notice because it “adapted its EEO program to align with the Commission’s guidance” encouraging the use of digital filing in light of the National Emergency declared due to the Coronavirus (COVID-19), does not excuse its failure to provide the proper mailing address on its Notice. Particularly where, as here, the preference for electronic communication is not explained in the Notice and references to mailing in the timeliness language are included. Further, a preference for a specific filing method does not preclude a complainant from filing by mail as continues to be reflected in Commission regulations.

We acknowledge that Complainant was provided with the proper recipient to include on her filing, the Director, OEOCR.

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one from your office picked up the package and the union did.” The union representative clarified that she had not represented Complainant in her EEO matter since July 27, 2021.

However, this fact alone is insufficient to establish untimely filing given the similarity to the recipient identified by Complainant and where the delayed delivery could also be attributed to the lack of mailstop, which was not provided to her. 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)). We do not find that the Agency has met its burden here.

To the extent that the Agency argues that Complainant failed to exercise due diligence, we disagree. Specifically, the Agency argues that Complainant knew the Agency had not received the complaint when she received the receipt signature card on August 16, 2021, and failed to take immediate steps to ensure delivery to OEOCR. However, the record tends to contradict the Agency’s assertion, as Complainant’s September 27, 2021 emails to the Agency express her confusion regarding why the union representative had the complaint.

#### *Untimely Counselor Contact*

Additionally, the Agency dismissed claim 3 for untimely counselor contact. Under 29 C.F.R. § 1614.105(a)(1), complaints of discrimination should be brought to the attention of the 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. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 45-day limitation period is triggered. See Howard v. Dep’t of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent. (Complainant v. United States Postal Serv., EEOC Appeal No. 0120120499 (Apr. 19, 2012)).

We find that claim 3 was properly dismissed for untimely EEO contact, because it concerns an allegedly discriminatory act that occurred on January 20, 2021, 98 days prior to Complainant’s initial EEO contact on April 28, 2021. However, the Agency shall still consider claim 3 as background information regarding the hostile work environment/harassment allegation. See Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002); see e.g. Marti F. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120170128 (June 15, 2017)

#### CONCLUSION

Accordingly, the Agency's final decision dismissing claim 3 is AFFIRMED. The Agency’s dismissal of the remainder of the complaint was improper and is hereby REVERSED. Claims 1, 2, and 4-8 are REMANDED for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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).

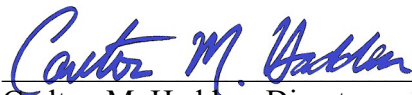
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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:



Carlton M. Hadden, Director  
Office of Federal Operations

July 12, 2022

Date