

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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

Devona V.,[[1]](#footnote-1)

Complainant,

v.

John F. Kelly,  
Secretary,  
Department of Homeland Security  
(Transportation Security Administration),

Agency.

Appeal No. 0120171555

Agency No. HS-TSA-26780-2016

DECISION

Complainant filed a timely appeal with this Commission from an Agency final decision, dated February 17, 2017, dismissing a formal complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

# BACKGROUND

Complainant was formerly employed with the Agency as a Master Transportation Security Officer - Behavior Detection Officer (MTSO-BDO) at the Agency’s General Mitchell International Airport in Milwaukee, Wisconsin. Believing that she was subjected to unlawful discrimination based on disability and in reprisal for prior protected EEO activity, Complainant contacted an EEO Counselor. Informal efforts to resolve Complainant’s concerns were unsuccessful.

Subsequently, on October 11, 2016, Complainant filed a formal complaint alleging she was harassed on the bases referenced above.

The Agency dismissed the formal complaint on the grounds that it was untimely filed. According to the Agency, both Complainant and her non-attorney representative were sent the Notice of Right to File (hereinafter “Notice”) via e-mail. Relying upon the “EchoSign” electronic tracking system, the Agency found that Complainant and her representative both opened and viewed the Notice on September 20, 2016. The Agency therefore concluded that based on a September 20, 2016 starting date, the fifteen-day time limit for timely filing a formal complaint expired on October 5, 2016. The Agency determined, however, that the formal complaint was not filed until October 11, 2016, six days late.

Complainant filed the instant appeal.

# ANALYSIS AND FINDINGS

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 fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.106, which, in turn, requires the filing of a formal complaint within fifteen (15) days of receiving notice of the right to do so.

In the instant case, the Agency asserts it sent the Notice by e-mail on August 30, 2016. However, the record reflects and the Agency does not dispute, that the e-mail was not received by Complainant on that date. Instead, relying upon an electronic tracking system, the Agency reasoned that Complainant “opened and viewed” the Notice on September 20, 2016. Complainant argues, however, that she understood the time limit to begin when the Notice itself was viewed. She contends that the Notice, attached to the Agency email, was opened on September 30, 2016, and therefore, her October 11, 2016 filing was within the fifteen-day time limit.

In this case, the Agency contends the fifteen-day time limit began from the date it believes Complainant opened and viewed the Notice, on September 20, 2016. According to the Agency, the Echo Sign tracking system enabled it to see that Complainant or her representative opened the e-mail on September 20, 22, 27, and 30, 2016. In support of its determination, the Agency provided a copy of the Echo Sign tracking history for Complainant’s Notice.

On appeal, Complainant’s representative does not dispute that the e-mail was received on September 20, 2016. Instead, he argues that the EEO Counselor informed him that the time limit for filing the formal complaint began *when the Notice attachment was opened*. Moreover, the record contains a September 22, 2016 email from Complainant’s representative to an EEO Counselor and other Agency officials, containing “concerns/questions” about recently received e-mails. Specially, the representative asks: “Who is TSA Civil Rights Division: [eschosign@echosign.com](mailto:eschosign@echosign.com)? The emails tell me I have to take some action are coming from this link or e-mail address. Is this legitimate, is ‘echosign’ a private company working for TSA?” Also, he asks “What is the NRTF notice? Sorry, don’t know your agency’s shorthand.” Complainant’s representative queries: I’m interested in what I am supposed to be clicking on and what that clicking will approve.” There is no evidence in the record regarding whether, or when, the Agency replied to the representative’s questions. Additionally, the instructions included with the Notice itself state at the top, in bold: “NOTICE: To file a formal complaint of discrimination, you must do ALL of the following within 15 calendar days of ***first accessing***this notice” (emphasis added). Consequently, we find that the Agency itself contributed to the misunderstanding regarding the start of the filing time limit. The Commission has previously held that an agency may not dismiss a complaint based on a complainant's untimeliness, if that untimeliness is caused by the agency's action in misleading or misinforming the complainant. See Wilkinson v. U.S. Postal Serv., EEOC Request No. 05950205 (Mar. 26, 1996).

Therefore, due to the circumstances in this case, we find it appropriate to waive the time limit for filing a formal complaint. See 29 C.F.R. § 1614.604(c).

# CONCLUSION

The Agency’s final decision to dismiss the formal complaint on the grounds that it was not timely filed is **REVERSED**. The formal complaint is **REMANDED** to the Agency for further processing in accordance with the **ORDER** below.

ORDER (E0610)

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 becomes final. 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 becomes final, 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.

A copy of the Agency’s letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION’S DECISION (K0617)

Compliance with the Commission’s corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency’s report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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.

# 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

July 21, 2017

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Date

1. 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. [↑](#footnote-ref-1)