

A taxpayer alleged that she overpaid her federal taxes and attempted on numerous occasions to get a refund from the Internal Revenue Service (IRS). An IRS agent refused to grant the taxpayer a refund without auditing her tax returns. The taxpayer, after exhausting all administrative remedies, sued the agent in his individual capacity in federal court to recover damages pursuant to a federal statute permitting this type of action. The agent was personally served with process at his residence 30 days after the complaint was filed. The United States government also received process.

Can the agent successfully argue that service of process was improper?

- A. No, because the agent was personally served at his residence.
- B. No, because the taxpayer still had time to cure any defect with service of process.
- C. Yes, because the agent, as a government employee, cannot be served with process at his residence.
- D. Yes, because the taxpayer should have served the IRS instead of the agent.

## Explanation:

In most lawsuits, only the defendant(s) named in the plaintiff's complaint need to be served with process. However, FRCP 4(i) provides special service rules when the plaintiff sues a **federal government officer or employee** for actions related to his/her government duties. The requisite service of process depends on whether the officer or employee is sued in an:

- official capacity – when recovery is sought from the U.S. government's treasury *or*
- individual capacity – when recovery is sought from the officer's or employee's own pocket.

When the officer or employee is **sued in an individual capacity**, the officer or employee must be **served with process** pursuant to the rules for **serving an individual**—eg, personal delivery of process. If these rules are not followed, then the action should be dismissed without prejudice. Process must also be **served on the U.S. government**. If it is not, then the court must allow the plaintiff a **reasonable time to cure** that failure.

Here, the taxpayer sued the IRS agent in his individual capacity for actions related to his government employment. The agent was properly served with process since it was personally delivered to him at his residence **(Choice C)**. And since the taxpayer also served the U.S. government, the agent cannot successfully argue that service of process was improper.

**(Choice B)** Process was properly served here. But had the taxpayer failed to serve the U.S. government, she would have had a reasonable amount of time to cure that failure—not *any* defect with service of process.

**(Choice D)** A federal agency must be served with process when the agency is sued or a lawsuit challenges the agency's orders—not when, as here, the agency's officer or employee is sued in an individual capacity.

## Educational objective:

A federal officer or employee sued in an individual capacity for actions related to his/her government duties must be served with process pursuant to the rules for serving an individual. Process must also be served on the U.S. government, but if the plaintiff fails to do so, the court must allow a reasonable time to cure that failure.

**FRCP** = Federal Rule of Civil Procedure.

## References

- Fed. R. Civ. P. 4(i)(2)–(3) (service of process on federal officer or employee).
- Kentucky v. Graham, 473 U.S. 159, 165–66 (1985) (explaining the difference between suing a federal employee in his/her individual and official capacities).

### Service of process on federal officer or employee

