



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

████████████████████  
Jeremy S.,<sup>1</sup>  
Complainant,

v.

Robert D. Snyder,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 0120142917

Agency No. 200H-0541-2013100315

DECISION

Pursuant to 29 C.F.R. § 1614.403(a), the Commission accepts Complainant's Estate's (the Estate) appeal from the June 16, 2014, final Agency decision (FAD) concerning Complainant's equal employment opportunity (EEO) complaint alleging 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission's review is de novo. For the following reasons, the Commission REVERSES the FAD.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Team Leader/Assistant Nurse Manager at the Agency's VA Medical Center in Cleveland, Ohio. On January 29, 2013, Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (African-American), sex (male), and disability when:

1. On or about January 20, 2012, Complainant's supervisor (S1) deliberately misplaced his application for Family Medical Leave Act (FMLA);

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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.

2. On October 24, 2012, S1 questioned Complainant's co-workers about his patient appointments scheduled for October 23, 2012;
3. On October 25, 2012, S1 denied Complainant's request for 30 minutes of compensatory time for working past his tour of duty to care for a patient on October 23, 2012;
4. Beginning in March 2011, S1 has been "singling Complainant out" by closely monitoring his activities and overly scrutinizing his work;
5. From May 8, 2012 to February 13, 2013, S1 gave Complainant several Reports of Contact; and
6. On April 8, 2013, Complainant was escorted by the VA Police and referred for psychiatric evaluation.<sup>2</sup>

On July 10, 2013, the Agency notified Complainant that the 180-day period to complete its investigation would expire on July 28, 2013. The Agency informed Complainant of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ) after 180 days had passed from the filing of his formal complaint, or that he could consent to an extension to complete the investigation. The notice further informed Complainant that his complaint was "pending investigation," but that the Agency expected to complete the investigation by October 26, 2013. The record indicates that Complainant signed the form on July 17, 2013, agreeing to extend the timeframe for completion of the investigation.<sup>3</sup>

On August 19, 2013, the Agency assigned the complaint to an EEO Investigator. Prior to the commencement of the investigation, Complainant passed away. On December 17, 2013, Complainant's mother signed a second form agreeing to extend the investigation another 30 days and stating her intentions to participate in the investigation. That same day, the EEO Investigator initiated the investigation – 322 days after Complainant filed his formal complaint.

On January 7, 2014, the EEO Investigator completed the investigation. The Agency provided Complainant's mother with a copy of the report of investigation (ROI) and notice of her right to request a hearing before a Commission AJ on behalf of Complainant. On February 3, 2014,

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<sup>2</sup> The Agency dismissed claim (1) as a discrete act for untimely EEO counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency noted, however, that it would be considered as part of Complainant's overall hostile work environment claim. Additionally, the Agency accepted claim (6) as additional evidence supporting Complainant's hostile work environment claim, following a request from Complainant's mother.

<sup>3</sup> The signed portion of the notice did not indicate whether the investigation would be extended 30, 60, or 90 days. Report of Investigation (ROI), at 613.

Complainant's mother requested a FAD. In accordance with her request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b).

In the FAD, the Agency determined that the alleged incidents were insufficiently severe or pervasive to establish a hostile work environment. Further, the Agency found that there was no evidence that the alleged incidents were based on discriminatory animus. Additionally, the Agency concluded that Complainant failed to show that the Agency's reasons for its actions were pretextual. As a result, the Agency found that Complainant had not been subjected to discrimination or a hostile work environment as alleged. The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, the Estate, through its attorney, argues that the Agency should be sanctioned for its failure to timely initiate or complete its investigation into Complainant's EEO complaint within the regulatory timeframe. The Estate contends that Complainant's case is an illustration of the necessity for agencies to adhere to the regulatory time periods prescribed for conducting and completing investigations. The Estate notes that Complainant was alive at the end of the 180-day period following the filing of his formal complaint, but the Agency had not even assigned the case to an investigator at that time. As a result of the Agency's "egregious disregard" for the Commission's regulations, the Estate argues that Complainant lost any real opportunity to participate in the investigation of his claims, which would have included an opportunity to provide affidavits and identify witnesses and documents in support of his claims. The Estate contends that this case is a graphic illustration of the prejudice caused when the Agency fails to act in a timely manner on an EEO complaint. The Estate states that Complainant's mother was left with a record devoid of any testimony from her son, which placed her in a difficult situation where she could not reasonably be expected to prevail on the claims, or at least would have had a difficult time doing so. Accordingly, the Estate requests that the Commission reverse the FAD and impose the appropriate sanction of default judgment against the Agency.

In response, the Agency argues that a default judgment sanction is unwarranted and inappropriate as there is no evidence that it engaged in misconduct or acted in bad faith. Further, the Agency contends that the delay in commencing the investigation did not result in any harm to Complainant or the administrative process. The Agency claims that Complainant suffered no prejudice by its delay in completing the investigation and Complainant's next-of-kin was contacted to inform her of the process. Additionally, the Agency argues that Complainant's Estate has presented no factual evidence supporting a claim of discrimination or hostile work environment. Accordingly, the Agency requests that the Commission affirm its FAD.

## ANALYSIS AND FINDINGS

### *Violation of EEOC Part 1614 Regulation*

EEOC Regulation 29 C.F.R. § 1614.108(e) requires agencies to complete an investigation of a formal EEO complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the period for not more than an additional 90 days. In the instant case, the record indicates that Complainant filed the formal EEO complaint on January 29, 2013. On July 10, 2013, the Agency sent Complainant a notice informing him of the expiration of the 180-day timeframe for completion of the investigation and of his right to request a hearing. Additionally, the Agency stated in the notice that his complaint was “pending investigation,” but it expected to receive the completed investigation by October 26, 2013. Complainant was given the option to extend the investigative period for 90 days. Complainant’s signature appears on the form, voluntarily requesting an extension; however, the Estate questions its authenticity. Nonetheless, the investigation was not completed until January 7, 2014, well beyond the extension period and the October 26, 2013, expected completion date. The Agency has provided no explanation for its extraordinary delay in initiating and completing the investigation. Thus, the Commission finds that the Agency did not comply with its obligation to timely initiate and complete an investigation in accordance with the timeframes set forth at 29 C.F.R. § 1614.108(e).

### *Complainant’s Estate’s Request for Sanctions*

On appeal, the Estate urges the Commission to reverse the FAD and impose sanctions against the Agency for its flagrant failure to conduct a timely investigation. The Commission has exercised its inherent authority to enforce its 29 C.F.R. Part 1614 regulations by ordering sanctions in response to similar types of violations. See Complainant v. Dep’t of the Air Force, EEOC Appeal No. 0120132260 (July 15, 2015) (sanction where agency took 308 days to complete investigation, instead of 180 days mandated by EEO regulations); Royal v. Dep’t of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009) (agency’s delay in completing investigation within 180 days was “no small non-compliance matter” and warranted a sanction). Based on the conduct of the Agency in this case and its failure to show good cause for why sanctions should not be imposed, the Commission finds that the imposition of sanctions is warranted.

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party’s failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep’t of Veterans Affairs, EEOC Request No. 0520080052. Several factors are considered in tailoring a sanction and determining if a particular sanction is warranted: (1) the extent and nature of the non-compliance, and the justification presented by the non-complying

party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice; and (4) the effect on the integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007).

The Commission notes that our regulations require agency action in a timely manner at many points in the EEO process. Tammy S. v. Dep't of Def., EEOC Appeal No. 0120084008 (June 6, 2014). Compliance with these timeframes is not optional. As the Commission stated in Royal, “the Commission has the inherent power to protect its administrative process from abuse by either party and must insure that agencies, as well as complainants, abide by its regulations.” Because of the length of time it can take to process a federal sector EEO complaint, any delays in complying with the timeframes in the regulations can impact the outcome of the complainant's claims. Id. In this case, the Agency's extraordinary tardiness undermined the integrity and effectiveness of the EEO process and, sadly, deprived Complainant of the opportunity to participate in the investigation of his claims. Therefore, based on the circumstances present, the Commission finds that the Agency's delay warrants the severe sanction of granting default judgment in favor of Complainant. Moreover, default judgment should impress upon the Agency its need to henceforth initiate and complete investigations in a timely manner.

Indeed, we find that the Agency is in need of a reminder of its obligation to comply with the requirement to commence and complete the EEO investigation within 180 days of the date of the filing of the formal complaint. Although the Agency had the temerity to argue in its opposition brief that the sanction of a default judgment was unwarranted and inappropriate because it did not engage in misconduct and did not act in bad faith, and that the delay in commencing the investigation did not result in any harm to Complainant or the administrative process, we disagree. Our prior cases on default judgment find that the standard is not one of bad faith or misconduct. Additionally, we note that the Agency has been subject to default judgment no less than three prior times for the same infraction of failing to initiate the investigation within 180 days. See Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009); Reading v. Dep't of Veterans Affairs, EEOC Appeal No. 07A40125 (Oct. 12, 2006); Lomax v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070039 (Oct. 2, 2007), req. for recon. den., EEOC Request No. 0520080115 (Dec. 26, 2007).

#### *Remedy Following Default Judgment*

After deciding to issue a default judgment for a complainant, the Commission must determine if there is evidence that establishes the complainant's right to relief. One way to show a right to relief is to establish the elements of a prima facie case. See Royal, EEOC Request No. 0520080052; see also Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (April 21, 2005).

Complainant's complaint can be analyzed under both a disparate treatment and hostile work environment analysis. In order to prevail on a disparate treatment claim, Complainant must

satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13.

The record reveals that the Agency determined that Complainant established a prima facie case of discrimination based on disability as to claim (3). The Agency determined that Complainant was a qualified individual with a disability, S1 was aware of his disability, and Complainant suffered an adverse action on October 25, 2012, when S1 denied his request for compensatory time. Accordingly, the Commission agrees with the Agency that Complainant established a prima facie case of disability discrimination as to claim (3). In addition, the Commission finds that evidence from the EEO Counselor's Report and Complainant's formal complaint supports a finding that Complainant established a prima facie case of race and sex discrimination as to claim (3). ROI, at 66.

Finally, to establish a claim of hostile work environment Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected classes; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Here, the Commission finds that a reasonable fact-finder would conclude that the alleged incidents were insufficiently severe or pervasive to establish a discriminatory hostile work environment. The record reflects that the alleged incidents were more likely the result of routine supervision, managerial discipline, personality conflicts, and general workplace disputes and tribulations. Consequently, the Commission finds that Complainant's hostile work environment claim must fail. As such the Commission finds that there is sufficient evidence to support a conclusion, by default judgment, that Complainant is entitled to relief only for claim (3).

### CONCLUSION

Accordingly, the Commission REVERSES the Agency's final decision and REMANDS the matter for further action in accordance with this decision and the ORDER below.

ORDER

The Agency is hereby ORDERED to take the following actions:

1. Within **one hundred and twenty (120) days** of the date of this decision, the Agency shall conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages with respect to this complaint. Complainant's Estate will cooperate in the Agency's efforts to compute the amount of compensatory damages, if any, and will provide all relevant information requested by the Agency. The Agency shall issue a final decision on the issue of compensatory damages with appeal rights to the Commission. A copy of the final decision must be submitted to the Compliance Officer as referenced below.
2. The Agency shall provide a minimum of eight (8) hours of in-person training to its EEO managers and staff regarding their responsibilities concerning case processing and insuring that investigations are completed timely.
3. Consider taking appropriate disciplinary action against the responsible EEO officials still employed by the Agency. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
4. Post a notice in accordance with the paragraph below.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G1016)

The Agency is ordered to post at its VA Medical Center in Cleveland, Ohio copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations - **within thirty (30) calendar days** of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

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 submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 (M0416)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. 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. The requests 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 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

February 9, 2017  
Date