



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

[REDACTED]
Monroe M.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120170817

Hearing No. 460-2016-00133X

Agency No. 2015-26517-FAA-05

DECISION

On December 29, 2016, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 13, 2016, final action concerning his 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. For the following reasons, the Commission AFFIRMS the decision of the EEOC Administrative Judge and REVERSES the Agency's final order and REMANDS the matter back to the Agency for further processing.

ISSUE PRESENTED

The issue presented is whether the Administrative Judge abused her discretion when she sanctioned Complainant by dismissing his hearing request, and whether the Agency properly implemented the Administrative Judge's decision.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Airways Transportation System Specialist at the Agency's Hobby System Support Center in Houston, Texas.

On November 17, 2015, Complainant filed an EEO complaint alleging that the Agency subjected him to harassment on the bases of race (African-American), color (Black), and in reprisal for prior protected EEO activity arising under Title VII when:

1. on March 9, 2015, his supervisory duties were removed, and he was reassigned to a different duty station;
2. on May 28, 2015, he was issued a "45-day proposed removal memorandum" (suspension proposal), and was orally admonished;
3. on August 26, 2015, his request for reasonable accommodation was denied;
4. on October 13, 2015, he was questioned about an 8-hour outage that occurred in September 2014; and
5. effective October 4, 2015, he was suspended for seven (7) days.

On March 9, 2016, the Agency dismissed Complainant's claim alleging that he was discriminated against based on his race, color, and in reprisal when the Agency failed to respond to some of his requests made under the Freedom of Information Act. The Agency found that this allegation was a collateral attack on another process, and that it failed to state a claim under 29 C.F.R. § 1614.103 or § 1614.106(a).

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On June 27, 2016, the Agency propounded discovery requests on Complainant, which were due in 30 days. On July 28, 2016, the Agency emailed Complainant asking when they could expect his responses; Complainant replied that his response was not due until September. The Agency informed Complainant that the September date was the end of the entire discovery period when all discovery needed to be concluded, and that his responses were already past due. Complainant provided his response to the Agency on August 1, 2016. On August 9, 2016, the Agency emailed Complainant requesting to meet to discuss the deficiencies in his discovery responses. In the email, the Agency listed the specific nature of each deficiency. Complainant responded that he had complied "to the best of [his] knowledge," and accused the Agency of bullying him.

On August 11, 2016, the Agency filed a Motion to Compel Discovery and Request for Extension of the Discovery Deadline. Complainant submitted his response to the Agency's Motion on August 18, 2016; the Agency filed a reply to Complainant's opposition on August 22, 2016. Complainant filed three supplemental responses to the Agency's Motion on August 25, 2016, September 5, 2016, and September 7, 2016.

On September 14, 2016, the AJ issued an Order granting the Agency's Motion to Compel and Request for an extension of time for discovery. The AJ ordered Complainant to respond to all outstanding discovery requests by September 27, 2016. The AJ informed him that failure to do so could result in sanctions, up to and including a dismissal of the hearing. Additionally, the AJ noted that Complainant had not requested the restoration of the claim that was the subject of the Agency's March 9, 2016 dismissal (the Freedom of Information Act requests); and that she denied Complainant's motion to amend his complaint to include a claim regarding his removal from the "ATO Succession Planning Program for Technical Operations Manager" because his request to amend was untimely.

On September 28, 2016, the Agency emailed Complainant noting that his responses to their discovery requests were due the previous day. Complainant responded that he was unaware of any outstanding discovery and asked for assistance in identifying the specific items requested. The Agency immediately forwarded a copy of the AJ's Order to Complainant, along with other relevant documents.

On October 7, 2016, the Agency filed a Motion for Sanctions, noting that it had not yet received a response from Complainant on the outstanding discovery requests. Complainant submitted his response to the Agency's Motion on October 10, 2016. Complainant argued that he had responded to the AJ's September 14, 2016 Order and the Agency's discovery requests with three supplemental responses, and that he had demonstrated his willingness to comply with the discovery requests. Complainant further argued that the Agency had not complied with his discovery requests.

On November 3, 2016, the AJ issued an Order of Sanction Dismissal. The AJ determined that Complainant had not fully responded to the Agency's written requests to provide information, despite acknowledging receipt of the Agency's requests and the AJ's Order. The AJ noted that Complainant attempted to argue that the submissions that he provided prior to the AJ's Order satisfied the Order, which she found unpersuasive. Additionally, the AJ found that Complainant tried to redirect attention with his argument that it was the Agency who failed to comply with discovery. The AJ determined that there was good cause to dismiss Complainant's hearing request, and she remanded the complaint to the Agency, ordering it to issue a final decision pursuant to 29 C.F.R. § 1614.110(b).

When the Agency failed to issue a final order within forty (40) days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). On December 29, 2016, Complainant filed the instant appeal with a brief in support of his appeal.

On April 4, 2018, the Agency responded to the Commission's request for documents, and stated that it did not issue a final decision in the instant case because it had not been aware of the AJ's Order to issue a final decision until it received a copy of Complainant's appeal. The Agency did not file an opposition brief.

CONTENTIONS ON APPEAL

On appeal, Complainant requests that the Commission vacate the AJ's Order of Sanction and remand his case back for a hearing. He argues that the AJ failed to consider all his responses to the Agency's discovery requests, and that he had complied in "a good faith effort." Complainant also states that he followed the AJ's "special instructions" and provided revised discovery responses. In support of Complainant's argument, he cites to Cauldwell v. Federal Deposit Insurance Corporation, EEOC Appeal No. 0120122818 (Feb. 19, 2013), and provided a copy of all the documents he had related to the hearing.

ANALYSIS AND FINDINGS

Sanction

An EEOC AJ has the authority to sanction either party for failure without good cause shown to fully comply with an order. 29 C.F.R. § 1614.109(f)(3). The sanctions available to an AJ for failure to provide requested relevant information include an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information, exclusion of other evidence offered by the party refusing to provide the requested information, or issuance of a decision fully or partially in favor of the opposing party. See Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 3, 2000). These sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. A sanction may be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. If a lesser sanction would serve this purpose, an AJ may be abusing her discretion to impose a harsher sanction.

Upon review of the record, we find that the AJ's dismissal of Complainant's hearing request and remand of the matter to the Agency for a final decision was appropriate. In his first response to the Agency's discovery requests, we find that Complainant did not provide adequate responses to the interrogatories.² For example, in response to interrogatory 12, the Agency requested that Complainant provide the names of individuals who were witnesses to the allegations in his complainant. Complainant responded:

² We note that this, and other hearing documents, were not contained in the Agency's submission to the Commission but were provided with Complainant's appeal. We remind the Agency of its responsibility to submit complete records to the Commission.

The Complainant refers the Agency to pages A-22, A-24 through A-26, A-27, A-29, A-31, A-33, A-35, F1-11, pages F4-1 through F4-4 of the ROI. Every employee in the District, several in the Service Area, some employees in Headquarters whom [Complainant] works with on daily business for the Agency projects, day-to-day business. See exhibits A, B and C. Exhibits A through C is a solicitation of interest for the Hobby SSC Supervisory position that [Complainant] was/is assigned to. This solicitation went to all Tech Ops employees in the Houston local commuting area.

In their August 9, 2016 follow-up email to Complainant, the Agency noted that his response did not indicate who he believed were witnesses, and it requested that Complainant list every individual. As noted in the Agency's Motion to Compel, a review of the cited pages in the ROI did not indicate the names of Complainant's witnesses,³ and his interrogatory response generally refers to a group of employees at the Agency. Additionally, in response to document requests, Complainant answered many of the specific requests with, "Objection: Information requested is as/more easily available to Agency, included in ROI received from DOT and FAA."

We also find the instant case to differ from Cauldwell v. Federal Deposit Insurance Corporation, EEOC Appeal No. 0120122818, in which the Commission found that the complainant's actions did not warrant the sanction of a hearing dismissal. In that case, the record showed that the complainant was in frequent contact with the Agency and the AJ, and he tried to provide the requested information. The Commission determined that the complainant had not affirmatively failed to cooperate with the discovery process and the AJ's orders. Here, in the instant case, Complainant rebuffed the Agency's initial attempt to discuss the deficiencies in his responses to the discovery requests. Additionally, the Agency and AJ repeatedly had to prompt Complainant to act, who then submitted some additional information. However, Complainant picked and chose which interrogatories to respond to, and then claimed that he was compliant with the Agency's requests and the AJ's Order. Again, using interrogatory 12 as an example, Complainant submitted the same response quoted above in his August 18, 2016 response to the Agency's Motion to Compel,⁴ and claimed that he complied with the request.

We note that the AJ appropriately warned Complainant that his failure to comply with her September 14, 2016 order may lead to sanctions, up to and including the dismissal of his hearing request. On appeal, Complainant continues to maintain that he has complied with the AJ's Order; we disagree. Accordingly, we find that the AJ did not abuse her discretion when she sanctioned Complainant, and we AFFIRM the AJ's order to sanction Complainant with a dismissal of his hearing request.

³ Many of these ROI pages are work-related emails.

⁴ Complainant added one additional sentence, stating that he knew of no other witnesses.

Final Agency Decision

EEOC's regulations provide that an agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. 29 C.F.R. § 1614.110(b). In this case, on November 3, 2016, the AJ ordered the Agency to issue a final decision on the merits of Complainant's complaint. The Agency failed to do so and allowed the AJ's dismissal of Complainant's hearing request to become its final order through its inaction.⁵ To date, there is no indication that the Agency issued a final decision. As such, we REMAND this matter back to the Agency to issue a final decision, in accordance with the ORDER below. See Cox v. Dept. of Agriculture, EEOC Appeal No. 0120103149 (July 22, 2011); Alcindor v. Dept of Transportation, EEOC Appeal No. 0120130557 (May 3, 2013).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order implementing the AJ's dismissal of Complainant's hearing request and REMAND the case back to the Agency to issue a final decision.

ORDER

To the extent that it has not already done so, within sixty (60) days from the date this decision is issued, the Agency is ORDERED to take the following actions:

1. Issue a final decision, with appeal rights to the Commission's Office of Federal Operations, with respect to Complainant's allegation that the Agency harassed him based on his race, color, and in reprisal for protected EEO activity.

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 be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The report shall include supporting documentation verifying that the corrective action has been implemented.

⁵The Agency represented to the Commission that it allowed the AJ's Order of Dismissal to become its final order because it was unaware of the AJ's Order to dismiss the hearing request and issue a final decision on the merits of Complainant's complaint. We note that at the very least the attorney representing the Agency before the AJ in this case must have been aware of the Order and should have informed the EEO office of its responsibility to comply with the AJ's remand for a decision on the record.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

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)

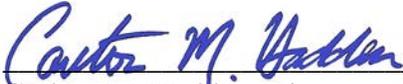
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

March 26, 2019

Date