



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

[REDACTED]
Joannie V.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120182175

Hearing Nos. 460-2014-00059X & 460-2018-00052X

Agency Nos. 2003-0580-2013102179 & 2003-0580-2016102438

DECISION

On June 15, 2018, 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 May 18, 2018 final order concerning her 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., 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Administrative Specialist, GS-9, at an Agency facility located in Houston, Texas.

On March 18, 2016, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and hostile work environment harassment based on disability (disabled veteran – Post Traumatic Stress Disorder), age (54), and reprisal for prior protected EEO activity when:

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.

1. about January 22, 2016, the Agency failed to select Complainant for a Supervisory Medical Administrative Specialist position (Vacancy Announcement JP-16-HRW-1577057),
2. on February 15, 2016, Complainant's second-level supervisor (S1) accused Complainant of hanging up the telephone on coworkers, and
3. on February 16, 2016, management declined Complainant's request for a permanent day shift as a reasonable accommodation.

Subsequently, in November 2016, Complainant amended her complaint to allege that the Agency discriminated against and harassed her when:

4. on February 22, 2016, S1 asked Complainant to send a Program Manager (S2) a weekly performance log of her accomplishments,
5. in March 2016, S1 approved a fact-finding about Complainant without her providing a statement,
6. in July 2016, S1 recommended that the Agency not allow Complainant to travel as part of a facility team to a Dallas, Texas medical center,
7. on October 13, 2016, S1 recommended that the Agency relocate Complainant's office space, and
8. in November 2016, S1 and S2 proposed to reassign Complainant to an Administrative Officer position, not to exceed grade 9, under S1's supervision.

For investigation, the Agency accepted incidents (1) through (3) as individual disparate treatment claims, and (1) through (8) together as a claim of harassment.

Post-Investigation

Following an EEO investigation, the Agency provided Complainant with a copy of the report of investigation and informed her of the right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision. On February 21, 2017, Complainant requested a hearing,² and, subsequently, she asked to consolidate an additional complaint for hearing.

On February 21, 2018, the assigned AJ issued a Sanction Order of Dismissal. The AJ dismissed with prejudice Complainant's hearing requests, citing, "Complainant's failure to follow the orders of the Administrative Judge and failure to prosecute." The AJ stated that she issued a Scheduling Order via email on February 1, 2018, and that Complainant did not report for the scheduled hearing. The AJ added that, while awaiting Complainant's arrival, she had Agency Counsel inquire into Complainant's attendance status and verify her email address.

² Complainant's hearing request contained a name and mailing address for her, and a name, mailing address, and telephone number for her non-attorney representative.

The AJ stated that Complainant did not respond, appear, request continuance, or indicate that there was an impediment to her appearance. After the AJ dismissed the hearing request as a sanction, in a final decision dated May 18, 2018, the Agency found no discrimination for both complaints, based on the evidence developed during the investigations.

The instant appeal from Complainant followed. On appeal, Complainant stated that, on February 1, 2018, the AJ sent notice of hearing via Outlook to Complainant's work email address. However, Complainant was on medical leave from work from December 27, 2017 through April 23, 2018, and did not receive the email. Complainant stated that she had informed the Agency and AJ how to contact her (by mail or telephone) and that the AJ typically contacted her via telephone. Complainant stated that the AJ did not receive an acceptance of the emailed hearing date, but still proceeded with hearing on February 21, 2018. Complainant provided an approved request for medical leave starting December 27, 2017, through an "unknown" period, for a cancer diagnosis and related surgery with post-treatment.

Complainant stated, on April 30, 2018, she inquired with the AJ about the status of her hearing requests and learned that her requests were dismissed. She provided proof of contact on that date with the assigned AJ. On appeal, Complainant asks to return to the hearing stage and for assignment to a different AJ. In opposition, the Agency stated that Complainant provided her work email address as her contact information and never changed her information to allow the AJ to know where to contact her.

ANALYSIS AND FINDINGS

The Commission's regulations afford broad authority to AJs for the conduct of hearings, including the authority to sanction a party for failure without good cause shown to fully comply with an order. See 29 C.F.R. § 1614.109 et seq.; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (MD-110), Chapter 7, III(D) (as revised August 5, 2015). An AJ may impose sanctions where a party fails to appear or be prepared for a conference or hearing pursuant to an order of the AJ. Id. These sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned.

Here, following an EEO investigation, on February 21, 2017, Complainant requested an EEOC hearing. The hearing request was assigned to an AJ. Subsequently, Complainant asked to consolidate an additional complaint for hearing. On February 21, 2018, the assigned AJ issued a Sanction Order of Dismissal, dismissing with prejudice Complainant's hearing requests. The AJ cited Complainant's failure to follow AJ orders and failure to prosecute. The AJ stated that she issued a Scheduling Order via email on February 1, 2018, and that Complainant did not report for the scheduled hearing. The AJ added that, while awaiting Complainant's arrival, she had Agency Counsel inquire into Complainant's attendance status and verify her email address. The AJ stated that Complainant did not respond, appear, request continuance, or indicate that there was an impediment to her appearance on February 21, 2018.

In the instant appeal, Complainant stated that neither she nor her hearing representative of record received notification of the scheduling of a hearing, as it was only sent to her work email address while she was on an Agency-approved medical leave of absence for four months (December 27, 2017 to April 23, 2018) due to a cancer diagnosis and the need for surgery and treatment. Complainant stated that she had informed the Agency and AJ how to contact her via her home address and telephone number, and that she had previously communicated with the AJ via telephone. Complainant stated that the AJ did not receive notice of an acceptance of emailed hearing date, but penalized her for not attending the February 2018 proceeding. Complainant stated, on April 30, 2018, she inquired with the AJ about the status of her hearing requests and first learned that the AJ dismissed her requests. On appeal, Complainant asks to return to the hearing stage.

Under the circumstances presented here, we conclude that the dismissal of Complainant's hearing requests improper, when she did not receive the scheduling order while she was on an approved medical leave and had previously informed the AJ and the Agency of her home contact information.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the final agency decision and REMAND the matter in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a request for a hearing, a copy of this decision, and the relevant complaint files (Agency Nos. 2003-0580-2013102179 & 2003-0580-201610243) to the Hearings Unit of the EEOC Houston District Office within thirty (30) calendar days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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:



Carlton M. Hadden, Director
Office of Federal Operations

November 14, 2018

Date