



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507**

Annalee D,¹
Complainant,

v.

Emily W. Murphy,
Administrator,
General Services Administration,
Agency.

Request No. 2019000778

Appeal No. 0120170991

Agency No. GSA-16-CO-Q-0027

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120170991 (October 10, 2018). EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). After reconsidering the previous decision and the entire record, the Commission finds that the request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request.

ISSUE PRESENTED

The issue presented is whether the underlying appellate decision involved clearly erroneous interpretations of material fact or law when it found that the Agency had undermined the integrity of the EEO process by allowing attorneys from the Office of General Counsel to assist management officials during the pre-hearing stages of the EEO process.

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

In Annalee D. v. General Services Administration, EEOC Appeal No. 0120170991 (October 10, 2018), the Commission affirmed the Agency's final decision finding no discrimination because Complainant failed to prove that the Agency's articulated legitimate, nondiscriminatory reasons were pretext for unlawful discrimination. While the Commission did not find discrimination on the merits of Complainant's underlying claims, the Commission nevertheless determined that the Agency's Office of General Counsel (OGC) had acted improperly during the pre-hearing stages of the EEO process by assisting management officials and other witnesses in the preparation of their affidavits. The Commission concluded that OGC's involvement in the pre-hearing stages constituted egregious conduct, which warranted sanctions to protect the integrity of the EEO process and to preserve the necessary firewall between the Agency's EEO program and the defensive functions of the Agency's OGC. As such, the Commission ordered the Agency to take the following remedial action:

The Agency shall provide at least four hours of in-person training to its EEO management officials and personnel in its Office of General Counsel regarding their responsibilities concerning EEO case processing and the appropriate role of the Office of General Counsel in the EEO process.

The Agency timely filed a request for reconsideration of the Commission's decision. In its request for reconsideration, the Agency does not dispute the Commission's finding of no discrimination regarding the merits of Complainant's underlying claims. Rather, the Agency objects to only the portions of the decision that found it had improperly assisted management officials during the counseling and investigative stages of the EEO process and that it should be sanctioned for that assistance.

ANALYSIS

The Agency contends that Commission erred in finding that it had improperly assisted management officials and other witnesses during the pre-hearing stages of the EEO process. In this regard, the Agency asserts that the Commission's Management Directive for 29 C.F.R. Part 1614 (MD-110) and appellate decisions do not clearly establish that agencies are prohibited from providing representation to its agents during EEO investigations. We agree.

Overview of the Concept of Conflict of Interest in the Federal Sector

Our decision in Annalee D., *supra*, addresses, in part, what may be referred to as an "interference" principle. This principle is addressed in MD-110, Chapter 1, § IV, "Avoiding Conflicts of Interest" and encompasses two important concepts. First, agency heads must not permit agency defense counsel to interfere with the investigation and deliberations of the EEO Office. Second, there should be separation or distance between an agency's EEO function and

its defensive function to “enhanc[e] the credibility of the [agency’s] EEO Office and the integrity of the EEO complaints process.” *Id.* at § IV.D.²

The interference principle is of critical concern in the federal sector EEO complaint process because agency heads must fulfill two potentially conflicting obligations regarding their handling of employment discrimination claims. Agency heads, on the one hand, have a duty to eliminate prohibited employment discrimination within their respective agencies. On the other hand, agency heads also have an obligation to defend their agencies against legal challenges, including charges of discrimination. Pursuant to the federal anti-discrimination laws, the agency head is the defendant in all employment discrimination lawsuits in the federal courts. These competing principles come into play in the dual roles the agency head performs through the EEO Office and agency defense counsel. The EEO Office carries out the Agency Head’s statutory obligation to investigate complaints, determine their validity following an investigation or hearing, and order corrective action when appropriate. The role of agency defense counsel is to carry out the Agency Head’s obligation to defend the Agency against legal challenges, including EEO complaints. *Id.* at § IV.

In recognizing the disparate yet vital responsibilities of the EEO Office and agency defense counsel, MD-110 recognizes that these entities will inevitably interact with each other. MD-110 sets out the parameters for these interactions and seeks to ensure that neither entity inappropriately interferes with the functions of the other. One purpose of the interference principle is to ensure that agency defense counsels do not exercise any functions that are committed to the EEO Office. For example, as stated in Chapter 1, § IV.D of MD-110, “the agency representative... may not conduct legal sufficiency reviews of EEO matters... such as acceptance/dismissal of complaints, legal theories utilized by the EEO Office during investigations, and legal determinations made in final agency actions...” Agency defense counsels also may not direct, control, interfere with, or overrule the activities of the EEO Office.

Our Holding in the Underlying Appellate Decision

Our decision in EEOC Appeal No. 0120170991 appears to set forth an absolute rule that prohibits agency defense counsel from participating in the pre-hearing stages of equal employment opportunity matters. While the Commission has long emphasized the importance of a firewall between the investigative functions of the Agency’s EEO program and the defensive functions of agency defense counsel, we find that the actions taken by the agency defense counsel in this case did not violate the firewall between the two functions. Indeed, nothing contained in MD-110 explicitly prohibits agency defense counsel from representing an agency manager during the counseling stage or bans agency defense counsel during the investigative stage from assisting an agency manager in preparing his or her affidavit or acting as a representative under the appropriate circumstances. There is no “bright line” regarding the extent to which agency defense counsel may be involved during the pre-hearing stages of the EEO process. Rather, the

² https://www.eeoc.gov/federal/directives/md-110_chapter_1.cfm#_Toc425745112

issue of utmost concern to the Commission is whether the actions of agency defense counsel improperly interfered with or negatively influenced the EEO process.

In Tammy S., we provided examples of actions that could improperly interfere with or negatively influence the EEO process. Tammy S. v. Dep't of Defense, EEOC Appeal No. 0120084008 (June 6, 2014). In that case, the Office of General Counsel pre-interviewed witnesses prior to their interviews with the EEO investigator and attempted to intimidate complainant by threatening to cancel her pre-approved leave when scheduling her deposition. In imposing sanctions against the agency, we emphasized that it is one thing for an Office of General Counsel to take seriously its duty to zealously represent its client agency in the course of defending an EEO complaint, but it is another thing entirely to intimidate a complainant and her witnesses, and to potentially affect the course of the investigation by discouraging employee participation in the official business of the agency in investigating and resolving complaints of unlawful employment discrimination. We sanctioned the agency because the record showed that agency defense counsel improperly interfered with or negatively influenced the EEO process by engaging in conduct discouraging participation in official business, *i.e.*, an EEO investigation. We determined such conduct to be egregious.

Absent such egregious conduct, however, we have traditionally declined to impose sanctions where agency defense counsel only assisted in the development of affidavits during the EEO investigation. For example, in Rucker v. Department of the Treasury, EEOC Appeal No. 0120082225 (February 4, 2011), where the complainant contended that the agency's Office of General Counsel improperly injected itself into the EEO investigation by reviewing and assisting in the development of management officials' statements before submitting them to the EEO investigator, we expressly refused to address this contention. Rather, we merely reminded the agency of its obligation to protect the integrity of the EEO process.

Similarly, in Hortencia R. v. Social Security Administration, EEOC Appeal No. 0120150228 (May 3, 2017), the complainant alleged that the agency's Office of General Counsel had improperly injected itself into the EEO investigation by reviewing and assisting in the development of management officials' statements before submitting them to the EEO investigator. The agency, in response, stated in that its legal representatives had informed the selecting officials that their affidavits "appeared in places to be identical, and that [the EEO Investigator] may have "cut and paste[d]" some of [the Group Supervisor's] to [the Selecting Official's] affidavit." The Agency noted that the selecting officials thereafter revised their affidavits in places to reflect what they had actually told the EEO investigator but left some responses intact because they were truthful, accurate, and based on personal knowledge. There was insufficient evidence to show that the agency had improperly interfered with or negatively influenced the EEO process. We again declined to address the agency's actions and merely reminded the agency of its obligation to protect the integrity of the EEO process.

In the instant case, although we previously found that the Agency's Office of General Counsel acted egregiously by assisting agency management officials during the pre-hearing stages of the

EEO process, upon further consideration, we find that such determination involved a clearly erroneous interpretation of material fact or law. In the underlying appellate decision, we found impermissible interference solely on the grounds that agency defense counsel provided assistance to management officials during the investigative stage and not because the provided assistance actually interfered with the EEO Office's investigative process. Unlike the facts in Tammy S. supra, there is no evidence in this case that the Agency's Office of General Counsel improperly intruded upon, interfered with, or negatively influenced the EEO process. We find that the facts in this case are more akin to Rucker, supra, and Hortencia R., supra, where the Commission did not fault agency defense counsel for assisting in the development of affidavits during the EEO investigation. In this regard, the record in the instant case shows that the investigator was able to obtain affidavits from each of the agency management officials and witnesses he or she identified. The record also shows that the Agency's Office of General Counsel, in representing the Agency's interests, did not impermissibly interfere with the investigator's activities, such as by formulating the questions asked by the investigator, altering or withholding statements/records from management officials/witnesses, limiting the individuals whom the investigator could interview or otherwise directing the investigator on how to proceed. We conclude that the underlying appellate decision improperly found that the ordinary exercise of the functions of agency defense counsel constituted egregious conduct.

So that our position is clear, we expressly hold that MD-110 permits agency defense counsel to participate in the pre-complaint and investigative stages under clearly defined and controlled conditions that will carry out the Agency Head's obligation to defend the Agency against legal challenges while avoiding inappropriate interference with the activities of the EEO Office. This means that agency defense counsel may assist agency management officials and witnesses in the preparation of their affidavits during the investigative stage. However, agency defense counsel may not instruct officials to make statements that are untrue or make changes to any affidavit without the affiant's approval of such changes. Agencies may also be assisted by agency defense counsel in informal resolution talks during the counseling stage so long as agency defense counsel suggests, but does not dictate, settlement terms.

In reaching this conclusion, we recognize that there are a number of other activities that agency defense counsels could engage in during the pre-hearing stages that may impermissibly interfere with the pre-hearing EEO process and may not be proper or necessary to competently defend the agency. Rather than address these hypothetical activities, we have limited our analysis to the actions of agency defense counsel in the underlying case. We also do not address the Agency's other contentions regarding the propriety of our decision to impose sanctions because we have already determined that the underlying appellate decision involved a clearly erroneous interpretation of material fact or law on that issue for the reasons noted above.

CONCLUSION

After reconsidering the previous decision and the entire record, the Commission finds that the agency's request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request and VACATE the imposition of sanctions. The decision of the Commission in Appeal No. 0120170991 is MODIFIED to reflect our holding herein. There

is no further right of administrative appeal on the decision of the Commission on a Request to Reconsider.

COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission’s decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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.

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:

/s/ Bernadette B. Wilson

Bernadette B. Wilson
Executive Officer
Executive Secretariat

November 27, 2019

Date