



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

[REDACTED]
Miguelina S.,¹
Complainant,

v.

William P. Barr,
Attorney General,
Department of Justice,
Agency.

Request No. 2019002953
Appeal No. 0720160012, Prior Request No. 2019000598
Hearing No. 570-2012-00823X
Agency No. OBD-2011-00556

DECISION ON RECONSIDERATION

The Equal Employment Opportunity Commission (EEOC or Commission) exercises its discretion to reconsider the decision issued in EEOC Appeal No. 0720160012 (September 27, 2018), request for reconsideration denied, EEOC Request No. 2019000598 (March 15, 2019). Because we have identified an error of law in the appellate decision, we reopen this case on our own motion.

ISSUE PRESENTED

The issue presented is whether the EEOC Administrative Judge erred when, in the absence of an order, he sanctioned the Agency with a default judgment in favor of Complainant for its failure to timely complete the EEO investigation in this matter, where it took the Agency a total of 330 days to complete the investigation of the complaint after it was filed, including 129 days to determine acceptance of the complaint.

BACKGROUND

Proceedings Below

At the time of events giving rise to this complaint, Complainant worked as a Trial Attorney, GS-14, in the Agency's Consumer Protection Branch of the Civil Division in Washington, D.C. She was hired into the position in August 2010, in a position not-to-exceed (NTE) January 31, 2012.

On June 17, 2011, Complainant filed a formal EEO complaint alleging discrimination based on sex, disability, age, and/or reprisal for prior EEO activity when, in March 2011, she was

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.

constructively discharged from her position when she resigned from the Agency in lieu of termination. The Agency accepted the complaint and issued a letter authorizing an investigation into the claims on November 16, 2011. On May 15, 2012, the Agency transmitted the report of investigation to Complainant with notice that she could request a hearing or an immediate final decision.

Complainant requested a hearing before an EEOC Administrative Judge (AJ). On January 21, 2013, Complainant filed a motion requesting that the AJ issue a default judgment in her favor as a sanction for the Agency's "failure to conduct an adequate EEO investigation and its failure to complete the EEO investigation as mandated within the regulatory timeframe." The Agency submitted an Opposition, as well as a Motion to Dismiss.

On May 30, 2014, the AJ granted Complainant's Motion for Default Judgment as a sanction against the Agency for its failure to complete the investigation within 180 days of the filing of the complaint as required by 29 C.F.R. § 1614.108(e). The AJ determined the Agency issued the report of investigation 330 days after the complaint was filed. The AJ was not persuaded by the Agency's various reasons for the delay or its legal arguments against the imposition of the sanction. The AJ went on to conclude that Complainant had established a prima facie case of constructive discharge based on sex, age, and disability and issued an order providing the Agency with 60 days to conduct discovery limited to the scope of damages related to Complainant's complaint.

On October 27, 2015, the AJ issued a Ruling and Order on various motions filed by the parties, finding that Complainant had failed to cooperate during the discovery phase for damages. Therefore, the AJ cancelled the damages hearing and rescinded his previous finding that Complainant had established a prima facie case of discrimination based on sex, age, and disability regarding her constructive discharge claim. The AJ determined, however, that Complainant was entitled to attorney's fees² and compensatory damages and ordered the Agency to issue a final decision addressing her entitlement to those remedies.

On December 4, 2015, the Agency issued its final order and simultaneously filed an appeal challenging the AJ's default judgment in favor of Complainant and the order of damages. Complainant filed a cross-appeal challenging portions of the AJ's decisions and orders.

Appellate Proceedings

In EEOC Appeal No. 0720160012, we found that the AJ did not exhibit undue bias against Complainant; the AJ did not abuse his discretion when he sanctioned the Agency by entering default judgment in favor of Complainant because the Agency did not timely complete the investigation; the AJ did not abuse his discretion when he cancelled the damages hearing; and the AJ inappropriately rescinded his finding that Complainant established a prima facie case of discriminatory constructive discharge. We also found that Complainant was entitled to the full range of applicable personal relief associated with the constructive discharge claim, including reinstatement, back pay and benefits, compensatory damages, and attorney's fees.

² Complainant has represented herself throughout these proceedings and therefore is not entitled to attorney's fees.

The Agency filed a request for reconsideration of this decision, which was subsequently denied for failure to meet the criteria for reconsideration set forth in 29 C.F.R. § 1614.405(c). EEOC Request No. 2019000598 (Mar. 15, 2019).

ANALYSIS AND FINDINGS

EEOC regulations confer upon its AJs “full responsibility for the adjudication of the complaint, including overseeing the development of the record.” 29 C.F.R. § 1614.109. During the hearing stage, AJs also ensure the integrity and efficiency of the administrative process. In executing such responsibility, an AJ is authorized, among other things, to “regulate the conduct of hearings,” “exclude any person who is disruptive,” issue a decision without a hearing when there are no genuine issues of material fact in dispute, and “impose appropriate sanctions on parties who fail to comply with orders or requests.” Equal Employment Opportunity Directive for 29 C.F.R Part 1614 (MD-110), Chap. 7, Sect. III(D) (Aug. 5, 2015).

EEOC Regulation 29 C.F.R. § 1614.109(f)(3) specifically sets forth the types of sanctions an AJ may take when required by the appropriate circumstances. An AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate. Id.

However, MD-110 indicates that an AJ’s ability to issue the sanctions set forth in 29 C.F.R. § 1614.109(f)(3), including default judgment, is limited to conduct by the parties involving a failure “to comply with the Administrative Judge’s order or request.” MD-110, Chap. 7, Sect. III(A). For example, MD-110 states that “[b]efore an Administrative may sanction an agency for failing to develop an impartial and appropriate factual record, the Administrative Judge *must issue an order* to the agency or request the documents, records, comparative data, statistics, or affidavits” (emphasis supplied). Id.

The AJ’s May 30, 2014, sanction decision reflects that he imposed the default judgment sanction for the Agency’s failure to meet the regulatory timeframes for conducting the investigation. However, because the AJ did not first issue a show cause order, the AJ failed to follow the procedures set forth in Chapter 7 of MD-110 in issuing the default judgment as a sanction against the Agency.

EEOC regulations require an agency to complete its investigation of a complaint within 180 days of the complaint’s filing, although, upon agreement of the complainant, the investigation may be extended for an additional 90 days, for a total of 270 days. 29 C.F.R. § 1614.108(e). In its regulations, the Commission contemplates circumstances, such as this, where an agency would not have completed the investigation within the required time limit. It is not readily apparent whether the Agency in this case in fact requested Complainant to agree to an extension, but it is clear that Complainant was not agreeable; and further, that at 330 days, the Agency exceeded even an extended time limit by a wide margin.

To be clear, we do not condone the Agency's substantial delay in conducting this investigation. However, the AJ should have followed proper procedures and issued a show cause order prior to ordering any sanctions according to the procedures in MD-110, Chapter 7.

The Commission has held repeatedly that sanctions must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. See Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007); Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000). The Commission's interest lies in deterring the underlying conduct of the non-complying party and protecting its administrative process from abuse by either party to ensure that agencies, as well as complainants, abide by its regulations. See Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). The factors pertinent to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted, include the following: (1) the extent and nature of the non-compliance, including 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, if any; and (4) the effect on the integrity of the EEO process. Id.; see also Gray, EEOC Appeal No. 07A50030; Vovsest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005). Here, we need not reach the question of whether an appropriately tailored sanction was imposed, because we have concluded that, in the absence of an order, the AJ erred in prematurely imposing a sanction authorized by 29 C.F.R. § 1614.109(f)(3).

CONCLUSION

On our own motion, the Commission has exercised its discretion in reconsidering the previous decision in Appeal No. 0720160012, request for reconsideration denied in Request No. 2019000598. The decision in Appeal No. 0720160012 is REVERSED, and the default judgment VACATED, with a finding that the AJ did not follow the appropriate procedures in issuing a default judgment in this case. The complaint is REMANDED to the Agency for further action in accordance with the following Order.

ORDER

Within thirty (30) calendar days of the date this decision is issued, the Agency is ORDERED to send written notice to the Hearings Unit of the EEOC's New Orleans Field Office to reopen Complainant's hearing request. A copy of this decision shall be attached to the notice. Within the same 30-day time period, the Agency shall provide the Hearings Unit with the complete complaint file. Thereafter, the assigned AJ shall either: (1) issue a show cause order, or (2) process the complaint on its merits pursuant to the procedures in 29 C.F.R. § 1614.109.

The Agency shall report its compliance with this Order as detailed below once it has forwarded the complete complaint file to the Hearings Unit.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 CFR § 1614.503(f) for enforcement by that agency.

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

January 27, 2020

Date