



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

[REDACTED]
Erich B.,¹
Complainant,

v.

Frank Kendall,
Secretary,
Department of the Air Force
(National Guard Bureau),
Agency.

Appeal No. 2023002763

Hearing No. 570-2022-00040X

Agency No. C-2021-110-NGB-ADR

DECISION

Concurrent with issuance of its final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission reverse an EEOC Administrative Judge's (AJ) entry of default judgment against it in the above-referenced complaint. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission VACATES the Agency's final order and REMANDS the matter for a hearing in accordance with our Order below.

ISSUE PRESENTED

The issue presented is whether the AJ abused his discretion when he issued a default judgment as a sanction against the Agency.

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

Complainant worked as a Supervisory Police Officer, GS-0083-09, at the Provost Marshal's Office in Arlington, Virginia. On March 15, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African American), disability (chronic low back pain, edema, cervical dystonia, right shoulder pain), and age (59) when:

1. On July 24, 2020, the Law Enforcement Chief, his immediate supervisor (S1), attempted to remove Complainant's supervisory detective, supply lieutenant, and certified investigator duties, and to replace Complainant in a training program;
2. On July 24, 2020, S1 removed Complainant's supervisory duties from his position description and changed his position to that of a non-supervisory lieutenant;
3. On unspecified dates during the first weeks of November and December 2020, S1 denigrated Complainant in front of his peers, attempted to find ways to discipline him, acted in an aggressive manner toward him, failed to include him in conferences, and blamed him for mistakes that he did not cause; and
4. From August 2020 to January 3, 2021, S1 failed to include Complainant in any daily briefings related to shift changes, scheduling, or any operational meetings and planning, but allowed two Caucasian employees to meet with S1 every single morning to discuss operational planning and briefings without any African American lieutenants attending.

Although the regulatory deadline for completing the investigation and submitting the investigative report (IR) fell on September 13, 2021, the investigation had yet to commence as of that date. On October 6, 2021, Complainant requested a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). On December 10, 2021, the deadline for completing the investigation with a mutually agreed upon 90-day extension had also passed, with no action being taken by the Agency on the investigation.

On January 31, 2022, the AJ issued an acknowledgement Order. On February 24, 2022, the Agency accepted the complaint for investigation. IR 34-38.

At the initial conference held the following day, the AJ determined that the Agency had never accepted the complaint for investigation before February 24, 2022. When asked by the AJ to provide an explanation for failing to do so, the Agency representative responded that the complaint was overlooked.

As of March 22, 2022, the Agency still had not completed the investigation. On that date, the AJ issued the Agency a Show Cause Order for untimely processing of the investigation. The AJ ordered the Agency to respond by April 6, 2022. The Agency failed to do so. On May 4, 2022, the AJ entered default judgment against the Agency for failing to respond to the Show Cause Order by the assigned deadline. The AJ also ordered Complainant to establish his entitlement to relief. On May 18, 2022, the Agency presented its completed investigative report to Complainant 430 days after the complaint had been filed. IR 3.

On December 2, 2022, the AJ issued an Order finding that Complainant failed to establish a prima facie case of discrimination but nevertheless established his entitlement to relief due to the entry of default judgment against the Agency. The AJ ordered the Agency to pay Complainant \$3,000.00 in nonpecuniary compensatory damages, provide training on complaint processing to EEO personnel, pay Complainant reasonable attorneys' fees, and to post a notice. The AJ gave Complainant until January 3, 2023, to submit the necessary documentation in support of his claim for attorneys' fees. On February 27, 2023, the AJ ordered the Agency to pay Complainant \$23,819.10 in attorneys' fees in addition to the other remedies awarded in his December 2022 Order.

CONTENTIONS ON APPEAL

On appeal, the Agency reiterates that Complainant failed to establish a prima facie case of discrimination and that in light of that finding, there was no need for training and no entitlement to attorneys' fees. As to the delay in completing the investigation, the Agency maintains that it was caused by the receipt of an overwhelming influx of cases by an EEO office that was beset with personnel shortages due to the COVID-19 pandemic. In arguing that Complainant was not entitled to any relief, the Agency characterizes the delay in completing the investigation as "harmless error."

On May 1, 2023, Complainant filed a cross-appeal. He initially argues that the AJ erred in determining that he failed to establish a prima facie case of discrimination.

He states that he belonged to multiple protected classes, that he was subjected to a hostile work environment that included being excluded from meetings, having duties taken away from him and given to White colleagues, and having S1 constantly undermining his position and denigrating his experience. IR 54, 183-89, 190-92, 197-98, 202-03, 206. He also claims entitlement to \$95,000.00 in nonpecuniary compensatory damages, arguing that the stress caused by his treatment at the hands of S1 drove him to retire on disability. IR 188, 195, 207, Appeal Brief, pp. 16-18.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.109(f)(3) provides that when a party fails without good cause shown to respond fully and in a timely fashion to an AJ's order, the AJ shall take appropriate action. That action may include entry of default judgment against the Agency as a sanction, but given its severity, it should be reserved only for the most egregious acts of agency non-compliance, such as failure to abide by an AJ's orders or requests. Clinton C. v. Dep't of the Interior, EEOC Appeal No. 2021003662 (Nov. 9, 2022), req. for recon. den. EEOC Request No. 2023001155 (May 25, 2023). Mere delays in the processing of a complaint, without a showing of egregious conduct on the part of the Agency are not sufficient to justify the imposition of default judgment. Id.

Factors pertinent to "tailoring" a sanction, or determining whether a sanction is even warranted, include: (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 injustice, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. See Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007); and Vovsest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005).

In applying the first and fourth factors, we find two instances of non-compliance. The first incident involved the Agency's failure to timely complete its investigation and present its investigative report. EEOC Regulation 29 C.F.R. § 1614.108(e) provides that an Agency shall complete its investigation within 180 days of the date of filing of an individual complaint, and that by written agreement, Complainant and the Agency may voluntarily extend the time frame for completing the investigation to no more than an additional 90 days. EEOC Regulation 29 C.F.R. § 1614.108(f) states that an Agency shall provide the complainant a copy of the investigative file within 180 days of the

date of filing an individual complaint. Here, the Agency completed its investigation and presented the investigative report 247 days after the deadline for doing so had passed. The reason the Agency provided in its final order and response to Complainant's cross-appeal for not completing the investigation in a timely manner was that it did not have enough personnel to handle an enormous influx of cases that occurred during the COVID-19 pandemic. The second instance of non-compliance was its failure to respond to the AJ's Show Cause Order as to why it should not be sanctioned for failure to timely complete and submit the investigative report. The Agency did not give a reason for its failure to respond to the Show Cause Order, either before the AJ or on appeal. In applying the second and third factors, we find that the Agency's failure to timely complete the investigation or to respond to the AJ's Show Cause Order had effectively ground the processing of the complaint to a halt, which substantially prejudiced Complainant.

In applying the fifth factor, we determine whether and to what extent the Agency's actions in connection with the processing of this complaint harmed the integrity of the EEO process. As noted above, mere delays in the processing of the complaint without evidence of egregious conduct are not sufficient to justify imposition of a default judgment. See Salvatore B. v. Dep't of Agric, EEOC Appeal No. 2019005314 (Mar. 5, 2021) (year-long delay in issuing FAD does not merit default judgment). But see Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018) (defiance of AJ Order not to repeat attempts to procedurally dismiss complaint sufficient to justify default judgment). In Genaro G. v. Dep't of Homeland Sec., EEOC Appeal No. 2020004241 (Aug. 9, 2022), a case similar to the one before us, the agency still had not commenced the investigation as of the date that the complainant requested a hearing. The AJ ordered the agency to produce the case file. When the agency failed to do so by the assigned deadline, the complainant moved for default judgment. The agency responded that it could not complete the investigation within the prescribed time frames because it did not have enough contract investigators with appropriate security clearances available. The AJ then issued a Show Cause Order as to why sanctions should not be imposed. The agency did not respond to the Show Cause Order but submitted the investigative report a week after the Show Cause Order was issued. On appeal, the Commission found that the agency responded to neither the Order to timely produce the case file nor the AJ's Show Cause Order, and that the investigative report was deficient as well as untimely. However, we did not find evidence of flagrant failure to comply with the AJ's Orders.

In remanding the matter for a hearing, the Commission ordered, in part, exclusion of evidence produced for the first time during discovery, exclusion of evidence produced in support of its motions for summary judgment and dismissal of the complaint, and exclusion of investigative affidavits and depositions in lieu of witnesses who were unavailable to testify. See 29 C.F.R. § 1614.109(f)(3)(iii).

In the instant case, as in Genaro G., we find that the Agency's substantial delay in initiating, completing, and reporting the investigation as well as its failure to respond to the AJ's March 22, 2022 Show Cause Order compromised the integrity of the EEO process. In so ruling, we do not take lightly the magnitude of the disruptions to the Agency's operations caused by the COVID-19 pandemic. We must point out however, that nearly all federal agencies had been contending with disruptions to their operations as a result of the pandemic but were still able to carry out their statutory responsibilities related to EEO. Had the Agency articulated and supported this reason in a timely response to the AJ's Show Cause Order, the AJ might well have considered it valid and justifiable. Due to the Agency's failure to respond to the Show Cause Order, the AJ and Complainant were left with no reason at all for the delay. While this was enough to harm the integrity of the EEO process, it did not constitute flagrant disobedience or willful disregard of the AJ's Orders, as was the situation in Chere S. For this reason, we find, as we did in Genaro G., that a default judgment is too harsh a sanction for the AJ to impose under the particular facts and circumstances of this case. In Genaro G., we imposed an evidentiary sanction. Consequently, we conclude that an evidentiary sanction is appropriate in the instant case as well.

Accordingly, we remand this matter for a hearing subject to the evidentiary restriction that the Agency will not be allowed to rely upon evidence produced in the untimely investigative report but must instead engage in new discovery in preparation for the hearing. To the extent that Complainant is also required to engage in new discovery, the Agency shall bear the costs of Complainant's discovery. Since we are nullifying the AJ's finding of default judgment, the order to award Complainant compensatory damages, attorneys' fees, and other relief is likewise nullified.

CONCLUSION

After a careful review of the record, including Complainant's arguments on appeal, the Commission VACATES the Agency's final order and REMANDS the matter for further action in accordance with this decision and the ORDER below.

ORDER

Within 30 calendar days of the date this decision is issued, the Agency is directed to submit a copy of the complaint file to the Hearings Unit of the EEOC's Washington Field Office. 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 hold a hearing subject to the evidentiary restrictions set forth in the decision and 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 (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 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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 (R0124)


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 their 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 12, 2024
Date