



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

[REDACTED]
Lee R.,¹
Complainant,

v.

Isabel Casillas Guzman,
Administrator,
Small Business Administration,
Agency.

Appeal No. 2023003371

Hearing No. 550-2022-00268X

Agency No. 07-21-033

DECISION

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 April 21, 2023, final order 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., 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

The issues presented are whether there was an abuse of discretion when the Administrative Judge (AJ) issued a decision prior to issuing a ruling on

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.

sanctions; whether the Agency should be sanctioned for failing to timely conduct the investigation; and whether the AJ properly issued a decision without a hearing finding no discrimination as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Business Opportunity Specialist at the Agency's District Office in San Francisco, California.

On October 15, 2021, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment on the bases of race (Caucasian), national origin (American), sex (male), color (White), disability (physical), and age (58) when:

1. on June 10, 2021, management initiated a factfinding into Complainant for failing to follow directives; not adhering to deadlines; and insubordination;
2. on May 3, 2021, during Complainant's presentation at the All-Hands Meeting, management interrupted him; did not allow him to finish; and berated him;
3. on March 3, 2021, Complainant asked about the 8(a) program,² and management responded "I've answered this before. [The Deputy Director] has conditions but has not entered them to certify. Go ahead and process this annual review as normal, and we will revisit conditions once she has entered them";
4. on or around August 20, 2020, management directed Complainant to manage a case of a Native American Tribal-owned firm participating in an 8a program saying, "none of us have had training on tribally owned firms, you need to call Oklahoma"; and
5. on an unspecified date in 2019, management told Complainant they wanted to hire a "young recent college graduate with a master's degree."

The Agency accepted the above claims for investigation. However, it dismissed the claim related to Complainant's 2019 performance rating based on his previously filed written grievance.

² The organization chart shows that "8(a)" is the name of Complainant's division. Report of Investigation at 117.

The Agency also dismissed Complainant's reprisal basis because he did not include reference to any prior EEO activity.³ Report of Investigation (ROI) at 61-2.

The record revealed that Complainant declined to participate in the EEO investigation, and he requested a hearing before an EEOC AJ more than 180 days since he filed his formal complaint. The Agency continued the investigation without Complainant's participation. ROI at 190, 194.

For claim 1, Complainant's first-line supervisor ("Supervisor") explained that a company within their 8(a)-portfolio complained about Complainant's behavior and the information was forwarded to Labor Relations for a factfinding inquiry. For example, Complainant failed to process an offer letter, which caused the company's loss of a contract. The results of the factfinding were inconclusive, and Labor Relations advised them to not move forward with any discipline. ROI at 265-7.

In response to claim 2, the Acting District Director averred that Complainant presented at an All-Hands meeting and stated that his program was the reason everyone had a job, and the Agency was terrible, and he berated the Agency. The Acting District Director tried to stop the meeting, but Complainant continued to speak. The Acting District Director explained that he ended the meeting because he did not want negativity at an all-hands meeting. The Acting District Director added that this incident was included as part of the factfinding in claim 1. ROI at 228-32, 241.

The Supervisor believed that he made the statement in claim 3, which was a typical conversation about how annual reviews were processed when there were still outstanding comments needed. ROI at 273.

In his formal complaint, Complainant alleged that the District Director made the statements in claims 4 and 5. She recalled a conversation with Complainant when he asked for additional training, and she suggested that he reach out to colleagues in areas with a lot of Native American entity-owned firms who have more experience. The District Director responded that she had no knowledge of incident 5. ROI at 19, 23, 209-10.

³ The Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015). On appeal, Complainant did not contest the Agency's procedural dismissals; as such, we will not address them in the instant decision.

Following his hearing request on May 26, 2022, Complainant filed a Motion for Default Judgment or Other Sanction for the Agency's failure to initiate the investigation on or about June 1, 2022. He averred that as of the date of his filing, 229 days had passed since he filed his formal complaint, which was beyond the Agency's 180-day deadline to complete the investigation.

The AJ assigned to the case determined *sua sponte* that the complaint did not warrant a hearing and issued a Notice of Intent to Issue Decision Without a Hearing ("Notice of Intent"). The AJ observed that Complainant's hostile work environment claim was comprised of discrete acts, and there was no evidence that an Agency official or employee made any comments about one of Complainant's protected categories. Further, the Agency set forth legitimate, nondiscriminatory reasons for its actions, and Complainant did not submit evidence that the reasons were pretexts for discrimination. The Agency timely responded to the Notice of Intent. Complainant filed a request for a ruling on his pending motion for sanctions for a default judgment and an extension to file his response to the Notice of Intent until the AJ issued a ruling on the sanctions motion.

The AJ issued a decision without a hearing on March 23, 2023. The AJ found Complainant's arguments that he could not properly respond to the Notice of Intent until there was a ruling on sanctions to lack merit. The AJ noted that Complainant had nearly five months to review the record, which was developed. Further, with no extension granted, there was no excuse for Complainant's failure to timely respond to the Notice of Intent. The AJ then entered a decision in favor of the Agency for the reasons included in the Notice of Intent and the Agency's response.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Through his attorney, Complainant argues that there was an abuse of discretion when the AJ failed to rule on, or even address, his pending motions prior to issuing a decision. He further argues that the record was not developed in this case, and that it was extremely prejudicial to have his claims dismissed on an undeveloped record.

Complainant asserts that a default judgment is the appropriate sanction in this case because the Agency imposed irreparable harm to Complainant's case. If the Commission determines that a default judgment is not warranted, Complainant requests some other sanction for the Agency's actions.

The Agency opposes the appeal. It responds that Complainant failed to provide any support for his contention that there was an abuse of AJ discretion, and an AJ choosing not to sanction a party does not rise to an abuse of discretion. The Agency explains that the delay was a result of the pandemic, and it began the investigation as soon as practicable in July 2022, and completed it in October 2022. The Agency further highlights that the AJ addressed Complainant's request for sanctions in the decision and concluded that his arguments lacked merit. The Agency also contends that Complainant's allegations do not reach a prima facie level of discriminatory harassment and requests that the Commission affirm its final order.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also EEO MD-110, at Chap. 9, § VI.B. (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

ANALYSIS

Decision Without a Hearing

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. He did not respond to the substance of the AJ's Notice of Intent to dispute any material fact. Further, Complainant offers no arguments on appeal to raise a genuine dispute of material fact.

While Complainant argues that the record was not developed, he did not identify how the record was inadequate. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

Sanctions

On appeal, Complainant argues that there was an abuse of discretion when the AJ failed to rule on or address his Motion for Sanctions prior to issuing the decision without a hearing. Under 29 C.F.R. § 1614.109, AJs are granted broad discretion in the conduct of administrative hearings, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order. See Malley v. Dep't of the Navy, EEOC Appeal No. 01951503 (May 22, 1997).

Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016), citing Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 n.3 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC).

We find that Complainant did not establish an abuse of AJ discretion. While the AJ did not explicitly deny Complainant's Motion for Sanctions, the AJ effectively denied Complainant's request for a default judgment in the decision. The AJ rejected Complainant's contention that he could not respond to the Notice of Intent until there was a ruling on sanctions because the Agency developed the record and produced the ROI, and he had five months to review it. See Hiroko V. v. Dep't of the Army, EEOC Appeal No. 2022003037 (Feb. 14, 2023) (the Commission found no abuse of discretion when the complainant filed a motion for sanctions, and an AJ subsequently issued a summary judgment decision and declined to sanction the agency for completing an investigation 251 days after the complaint was filed).

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and 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; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007).

In this case, Complainant filed his formal complaint on October 15, 2021. ROI at 15. An agency is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the time period. 29 C.F.R. § 1614.106(e)(2).

The Agency's deadline to complete the investigation was April 13, 2022. It did not complete the ROI until October 2022, approximately six months late.

Complainant renews his request for a default judgment on appeal. However, we find that Complainant did not show that a default judgment was warranted. The Commission has held that a default judgment is among the harshest sanctions that can be meted out and should only be imposed upon agencies that directly defy Commission orders and whose actions adversely impacted the conduct of the hearing. See Florentino S. v. Dep't of Transportation, EEOC Appeal No. 2023000237 (Jul. 11, 2024); Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018) (no abuse of discretion when the AJ issued a default judgment after the agency defied the AJ's order to cease filing frivolous motions to dismiss which repeatedly delayed the processing of the complaint); see also Ted L. v. Dep't of the Army, EEOC Appeal No. 2022003623 (Sept. 20, 2023)(finding that a default judgment was inappropriate for a delay in completing an investigation of at least 210 days when the complainant did not show any prejudice by the delay or any evidence of the agency's contumacious conduct or bad faith). There is no indication that the Agency's actions resulted in harms to support a sanction of a default judgment.

Complainant requests some other sanction if the Commission finds that a default judgment is not appropriate. In its opposition to Complainant's motion, the Agency explained that it experienced difficulties processing cases due to the COVID-19 pandemic and an extraordinarily high volume of new matters as a byproduct of the pandemic. For example, the Agency's Office of Diversity, Inclusion, and Civil Rights needed to process requests for exceptions to vaccine requirements, increasing its workload.

Complainant avers that the Agency did not provide any supporting evidence for its explanations, and that the Agency's opposition was untimely. However, even if the Commission were to disregard the Agency's response, Complainant did not show any prejudice or consequence resulting from the delay nor raise arguments related to an effect on the integrity of the EEO process. Complainant contends that he was prejudiced because his claims were "dismissed" based on an undeveloped record. Complainant Appeal Brief at 6. However, his claims were not "dismissed," and the AJ addressed the merits of his claims.

After considering the relevant factors for the specific circumstances of this case, we decline to sanction the Agency for the delay in conducting the investigation. We take this opportunity, however, to remind the Agency of its obligation to comply with Commission regulations in a timely manner.

Harassment

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove his hostile work environment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, his age, color, disability, national origin, race, or sex. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Even taking Complainant's allegations from his formal complaint as true, he offered no connection between the alleged harassment and any of his protected bases. ROI at 19-24. Rather, the complained of incidents occurred during the normal course of business when management officials initiated a factfinding based on complaints about Complainant's performance and his conduct; interrupted him during an all-hands meeting; responded that Complainant should process an annual review as normal; and directed him to contact others with more knowledge about tribally owned firms.

The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of his protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). There is no evidence that these work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of a protected class.

The District Director responded that she had no knowledge of claim 5. ROI at 210. However, even assuming, for the sake of argument, that she made the alleged comment about wanting to hire a young, recent college graduate and this was somehow related to Complainant's age, this was an isolated event that was not severe to rise to the level of harassment. Accordingly, we find that Complainant did not establish that the Agency subjected him to harassment based on his age, color, disability, national origin, race, or sex.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order adopting the AJ's decision.

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(f).


COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 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. If you file a request to reconsider and also file a civil action, **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

January 8, 2025
Date