



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

[REDACTED]
Vickie T.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Southern Area),
Agency.

Appeal No. 0120181675
Hearing No. 461-2018-00039X
Agency No. 4G-770-0345-16

DECISION

On April 23, 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 March 23, 2018, final decision 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. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

The issues presented are whether the Equal Employment Opportunity Commission Administrative Judge's dismissal of Complainant's hearing request for failing to participate in the initial hearing conference was an abuse of discretion; and whether Complainant established that she was discriminated against based on reprisal for prior protected EEO activity when on August 26, 2016, she became aware that she did not have the correct seniority date.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier Assistant 2 at the Agency's Spring-Klein Station in Spring, Texas.

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.

Complainant maintained that on August 26, 2016, she learned that she did not have the correct seniority date. Complainant alleged that because of her prior EEO activity, A1, the Customer Service Support Supervisor, and A2, the Field Recruiter, intentionally started her in a later orientation class. She indicated that her seniority date was listed as October 17, 2015, but she cleared all authorizations on August 14, 2015, and therefore, her seniority date should have been August 22, 2015.

A1 declared that she never told Complainant which orientation class she would be in, as the task of scheduling orientation belongs to Human Resources Training. She maintained that she told Complainant that the sooner she could get all her information in and respond to the seven-day job offer, the sooner she would be put in to the next available orientation class. A1 stated that she received an email from Human Resources on August 27, 2015, telling her they could not find Complainant's name in the system, so she sent her an email the same day asking if she had ever used any other names. She maintained that Complainant came to her office on September 4, 2015, with her new Texas driver's license and told her that she was denied because she received an email stating her license had expired.

A1 stated that she did remember that initially Complainant did not have a Texas driver's license and that in the interview invite and the interview itself, she told Complainant that she had to have a valid Texas driver's license. A1 stated Complainant's seniority date was determined when she reported to orientation on Monday, October 19, 2015. She explained that Complainant had to pass a drug test, a background and driving record check, as well as have a Texas driver's license. She testified that she was not involved in determining Complainant's seniority date and that it was determined according to the day Complainant started orientation. She explained that a seniority date is set on the first day of a pay period, which was October 17, 2015, which was the reason Complainant's seniority date was on that date.²

A2 stated that she was not involved with determining Complainant's seniority date and did not know who did. She stated that Complainant's seniority date was determined when her screens were cleared and there was room to process her on the rolls. She maintained that Complainant was interviewed by A1 on August 14, 2015, and that it would have been impossible to have her seniority date established as of August 22, 2015, as Complainant alleged it should have been. A2 indicated that it would have been impossible to have an orientation eight days after the interview, as Local Services would have had to receive and review the hiring packet first and then process it.

Complainant maintained that after she submitted her documentation for the City Carrier Assistant position, A1 learned of her prior EEO activity. Thereafter, Complainant stated that on September 3, 2015, she received a letter that indicated that she did not meet the requirements for the City Carrier Assistant because of her driving.

² The record included an email dated August 27, 2015, which indicated that Human Resources was not finding a match for Complainant's name in the system. The email string also showed A1 stated that Complainant came to her office on September 4, 2015 and told her that she was not selected for the position because her current driver's license was suspended.

Complainant explained that during each interview that she attended, she explained her prior EEO activity. It was ultimately determined that nothing was wrong with her driving record or her name and she was again offered the position and scheduled for orientation on October 14, 2015.

On December 17, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her in reprisal for engaging in prior protected EEO activity when on August 26, 2016, she became aware that she did not have the correct seniority date. At the end of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ).

Complainant requested a hearing, but the AJ subsequently dismissed the hearing request on the grounds that Complainant failed to appear at a scheduled status conference without providing an explanation. Specifically, the record indicates that on December 29, 2017, the AJ issued, by email service, (1) an Order of Acknowledgment and Case Management and (2) an Initial Status Conference Notice and Order, which set an initial conference date before the AJ on February 21, 2018 at 10:00 a.m. central time. Both orders indicated that there was the risk of a sanction for failing to appear at a scheduled event including, among other sanctions, the possible dismissal of the hearing request.

On February 21, 2018, Complainant did not appear at the conference. The AJ noted that they waited for 40 minutes for Complainant to call-in and appear. While waiting, the AJ telephoned Complainant twice without reaching her. Once, according to the AJ, it appeared that someone answered Complainant's cell phone but never spoke. The AJ left a message during the second attempted call and reminded Complainant that she had to appear and that sanctions could follow if she did not. The AJ also emailed Complainant about the conference and asked the Agency's representative to check with Complainant's managers. He discovered that Complainant was not scheduled to work that day. The AJ also noted that Complainant had failed to communicate with the representative after he had reached out to her about potential settlement prior to the conference. Despite the conference being scheduled months in advance, the AJ noted that Complainant never explained her failure to appear. Accordingly, the AJ dismissed the hearing request and remanded the complaint to the Agency. The Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant contends, among other things, that she first learned of the AJ's actions when she received the Agency's FAD. Complainant explains that when she filed her request for a hearing, she assumed that any notifications would be by first class or certified mail. Complainant indicated that she only included her email address on the form because the form requested it and she wanted to complete the form, but that although she had her email address for years, she does not check it regularly. As a result, she had no notice of the scheduled conference. Complainant noted that, in the past, she was notified about EEO conferences by mail.

She contends that she was waiting to hear from the AJ regarding scheduling and that it was not her intention to ignore the AJ's orders, she was simply unaware of the scheduled conference.

Further, Complainant contends that she never received written notice from the Agency's representative of possible settlement or a phone call to discuss a settlement. Complainant maintains that she would have responded. Moreover, Complainant asserts that the Agency had mailed its designation of the Agency's Representative to the wrong address. She also maintains that she was on approved annual leave at the time of the conference.

Complainant also discusses the merits of the case and maintains that the evidence shows that discriminatory animus was involved and that she could prove that the Agency's nondiscriminatory reasons were pretext for discrimination.

In response, the Agency contends, among other things, that Complainant can not establish a prima facie case of retaliation, and that it articulated legitimate, nondiscriminatory reason for its actions, and Complainant did not show that the reasons were pretext for discrimination. Regarding the dismissal of her hearing request, the Agency asserts that the AJ has broad authority when conducting hearings, and that when a party fails to respond to an order of an AJ, the AJ may, as appropriate, sanction the non-complying party.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), 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, 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").

At the outset, we note that an Administrative Judge has inherent powers to conduct a hearing and issue appropriate sanctions. EEO-MD 110 Ch. 7, § III(D) (Aug. 5, 2015); Complainant v. Dep't of Commerce, EEOC Appeal No. 0120140776 (Feb. 13, 2015). AJs have broad authority over the conduct of hearings. 29 C.F.R. § 1614.109 et seq. If a party does not respond to an order of an AJ, the AJ may, as appropriate, take action against the non-complying party pursuant to 29 C.F.R. § 1614.109(f)(3). In appropriate circumstances, an Administrative Judge may sanction a party for its conduct. Sanctions should be tailored to deter the party from similar conduct in the future and, if warranted, to equitably remedy any harm incurred by the opposing party. Sanctions should not be so severe that they result in inequity, nor should they be so lenient that they fail to serve as a deterrent. If a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, it may constitute an abuse of discretion to impose a harsher sanction. See Hale v. Department of Justice, EEOC Appeal No. 01A03341 (December 8, 2000). Administrative Judges must distinguish between conduct that does not warrant the imposition of a sanction and conduct which does.

In the instant case, we do not find that the AJ abused her discretion in dismissing the hearing request. There is no dispute that Complainant, on December 29, 2017, received the AJ's Order of Acknowledgment and Case Management and the Initial Status Conference Notice and Order, which set an initial conference date before the AJ on February 21, 2018 at 10:00 a.m. There is also no dispute that both Orders indicated that there was the risk of a sanction for failing to appear at a scheduled event including, among other sanctions, the possible dismissal of the hearing request. Although Complainant maintained that she did not regularly look at her emails, we find it reasonable to conclude that after more than a month she would have examined her emails. Moreover, Complainant did not deny receiving two phone calls from the AJ on her cell phone, and a voice message. Had she been unaware of the February 21, 2018 conference, she could and should have let the AJ know immediately, and the parties could have rescheduled the conference and addressed any concerns about the service of documents. There is no evidence that Complainant ever responded to the AJ's telephone calls. We find that the AJ appropriately tailored the sanction in this case to, among other things, ensure compliance with AJ Orders in the future.

To prevail in a disparate treatment claim absent direct evidence of discrimination, Complainant must satisfy the evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). Complainant carries the initial burden of establishing a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 441 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to prove, by a preponderance of the evidence, that the reason proffered by the Agency was a pretext for discrimination. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Assuming, arguendo, Complainant established a prima facie case of reprisal discrimination, we find that the Agency articulated legitimate, non-discriminatory reasons for why Complainant's seniority date was set at October 17, 2015. Complainant's seniority date was based on when she was scheduled for orientation, i.e., on Monday, October 19, 2015. According to A1, she never told Complainant which orientation class she would be in, as the task of scheduling orientation belongs to Human Resources Training, but that the sooner she could get all her information in and respond to the seven-day job offer, the sooner she would be put in to the next available orientation class. We find no persuasive evidence that Complainant was not given an earlier seniority date because of her previous EEO activity. On the contrary, the record indicates that her hiring paperwork was not completed until after September 4, 2015 when she presented a valid driver license. Accordingly, we find that Complainant did not establish that discrimination played any role in this matter.

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 decision finding no discrimination.

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 (S0610)

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. 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 22, 2020

Date