



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

[REDACTED]
Josiah M.,¹
Complainant,

v.

Chad F. Wolf,
Acting Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 0120181835

Hearing No. 510-2015-00209X

Agency No. HS-TSA-01554-2014

DECISION

On May 1, 2018,² 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 May 16, 2018, final decision 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., 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 REVERSES the Dismissal Order, VACATES the Agency's final decision, and REMANDS the matter back for a hearing.

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.

² We note that while Complainant's May 1, 2018, appeal was premature, the appeal is now ripe for adjudication as the Agency subsequently issued a final decision on May 16, 2018.

ISSUES PRESENTED

The issues are whether: (1) the Agency should be sanctioned for issuing a late final decision; and (2) an Equal Employment Opportunity Commission Administrative Judge (AJ) properly dismissed the complaint, finding that she did not have jurisdiction because the instant complaint should be processed as a mixed-case complaint or a mixed-case appeal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Federal Security Director (FSD) at the Agency's Jacksonville International Airport in Jacksonville, Florida. On August 27, 2014, Complainant filed a formal equal employment opportunity (EEO) complaint alleging that the Agency discriminated against him on the bases of sex (male) and age (57) when, on or about May 9, 2014, the Agency issued him a directed reassignment to the Des Moines International Airport, in Des Moines, Iowa, while replacing him with a younger, female FSD, who had minimal or no prior field experience.

On December 17, 2014, the Agency informed Complainant that it was accepting his complaint for investigation but that, due to an unusually high backlog, there would be delay in assigning an investigator. On March 9, 2015, the Agency sent Complainant a notice that it had not yet completed the investigation, and that it expected to complete it by May 30, 2015. On March 17, 2015, Complainant requested a hearing before an EEOC AJ.

On March 31, 2015, the initial AJ (AJ1) issued an order directing the Agency to produce the complaint file within fifteen (15) days from the earlier date of either its receipt of his order or Complainant's hearing request. The Agency uploaded a form letter stating that the investigative file was being transmitted, which was not accurate because the investigation had not been completed. When AJ1 scheduled the Initial Conference, the Agency requested to reschedule it due to a previously-scheduled vacation, but no mention was made of the incomplete investigation. The Initial Conference was rescheduled, and held on May 26, 2015, but AJ1 noted that it was meaningless because the investigative file had not yet been provided. The Agency uploaded the investigative file on May 29, 2015.

Throughout the hearing process, Complainant filed multiple motions to sanction the Agency. In its responses, the Agency noted that, in addition to its backlog, the investigation was slowed due to the nature of the claim because it takes longer to obtain affidavits from Agency witnesses who hold prominent positions. Additionally, the Agency stated that it had a 60% reduction in staff, and a 30% increase in cases.

On June 30, 2015, AJ1 granted Complainant's Motion for Sanctions and issued a default judgment against the Agency. In considering the relevant factors, AJ1 found that sanctions were warranted. Specifically, the investigation began, and was completed, very late; and when the Initial Conference was held, the Agency was still unable to provide any helpful information because the investigative file had not been completed.

Further, the Agency did not provide any information as to why it did not provide part of the investigation or explain why it could not be produced. When the investigative file was produced, Complainant noted that the relevant decision makers were never interviewed. AJ1 determined that the Agency's actions, and inactions, interfered with the Commission's ability to move forward with the matter, despite taking an additional three months to investigate. AJ1 entered a default judgment on liability against the Agency and moved the matter toward addressing Complainant's damages and attorney's fees.

On July 21, 2015, the Agency filed a Motion to Dismiss, arguing that the claim of a constructive discharge falls within the jurisdiction of the Merit Systems Protection Board (MSPB). On September 29, 2017, the second AJ (AJ2) granted the Agency's motion and dismissed the complaint. AJ2 found that "the record is beyond debate that since the case's inception, Complainant has consistently alleged that [Agency] senior executives have forced older, male FSDs, such as himself, to retire,³ rather than accept the directed reassignment." AJ2 noted that the instant complaint should have been processed as a mixed-case complaint or mixed-case appeal. Further, AJ2 stated that AJ1's previous decision did not change the nature of the underlying claim, nor bestow on AJ2 jurisdiction over a claim that fell within the MSPB's jurisdiction. As such, AJ2 dismissed the complaint without prejudice and ordered the Agency to process the case.

Complainant filed the instant appeal, and the Agency subsequently issued a final decision, in accordance with AJ2's order. As an initial matter, the Agency stated that the claim was whether the Agency discriminated against Complainant based on sex and age when, on or about May 9, 2014, Complainant retired after the Agency issued him a directed reassignment to Des Moines International Airport, in Des Moines, Iowa, and replaced him with a younger female, who had minimal or no prior field experience.

The Agency found that management officials articulated a legitimate, nondiscriminatory reason for reassigning Complainant. The Agency then found that Complainant did not show that the reason was pretext for discrimination. The Agency also found that Complainant was not constructively discharged because a reasonable person in his position would not have found the working conditions to be intolerable.⁴ The Agency gave Complainant rights to appeal its decision to the MSPB.

Complainant submitted a new appeal, after the Agency issued its final decision, and noted that he also appealed the Agency's final decision to the MSPB, in order to preserve his rights.

³ Complainant retired from the Agency on January 3, 2015.

⁴ We note that, despite the Agency's assertion that Complainant alleged a constructive discharge, a review of the investigative file shows that neither Complainant, nor any of the Agency's witnesses, were asked questions related to a constructive discharge claim.

On August 1, 2019, the MSPB dismissed Complainant's appeal, without prejudice, in MSPB Docket No. AT-0752-18-0554-I-2. Complainant requested that the MSPB dismiss his appeal, and the Agency agreed, stating that the MSPB should not process his appeal until the Commission issues its decision.

CONTENTIONS ON APPEAL

Complainant's Contentions

Through his attorney, Complainant filed his initial appeal prior to the issuance of the Agency's final decision, requesting that the Commission sanction the Agency because it had yet to issue a final decision, and it was 214 days after AJ2's decision at the time of his appeal.

In Complainant's second brief in support of his appeal, which he filed after receiving the Agency's final decision, Complainant argues that AJ2 erred when she found that the Commission lacked jurisdiction because he never alleged a constructive discharge in his complaint. Additionally, Complainant asserts that the Agency did not accept a claim of constructive discharge. While Complainant states that, due to the reassignment, he retired, he never amended his complaint to include a constructive discharge claim. Complainant also asserts that, even if he did allege a constructive discharge, the Commission has jurisdiction over his complaint because it is firmly enmeshed in the EEO process, as shown by AJ1's decision.

Agency's Contentions

The Agency submitted an initial brief opposing Complainant's appeal, arguing that Complainant's "appeal" was actually an attempted enforcement action of AJ2's order. The Agency also argues that Complainant's request for sanctions was not appropriate.

In the Agency's second brief, the Agency argues that the Commission should dismiss Complainant's appeal because he does not have appeal rights to the Commission. The Agency asserts that the Agency's decision on Complainant's mixed-case complaint can only be appealed to the MSPB because AJ2 properly decided that this was a mixed-case complaint.

ANALYSIS AND FINDINGS

EEOC Jurisdiction

As an initial matter, we note that the Agency contests the Commission's jurisdiction on the instant appeal because the Agency only provided Complainant appeal rights to the MSPB on his mixed-case complaint. However, we find that the question of the Commission's jurisdiction hinges on whether the claim in the instant complaint renders this a mixed-case complaint, which is a complaint of employment discrimination filed with a federal agency related to or stemming from an action that can be appealed to the MSPB. See 29 C.F.R. § 1614.302(a)(1).

As discussed below, we find that this is not a mixed-case complaint, and therefore, jurisdiction is properly with the Commission.

Sanctions

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).

On appeal, Complainant requests that the Commission sanction the Agency for its untimely issuance of the final decision. When an AJ dismisses a Complainant's hearing request, an agency has 60 calendar days from the receipt of the AJ's dismissal order to issue a final decision pursuant to 29 C.F.R. § 1614.110(b). See Alonzo L. v. Pension Benefit Guaranty Corp., EEO Appeal Nos. 0120171271, 0120171272 (Aug. 2, 2018). In this case, the Agency issued the final decision on May 16, 2018, which was 231 days after AJ2's September 29, 2017, dismissal order, and it was 171 days late.

While we note that the Agency stated that a backlog of cases delayed the issuance of the decision, based on the specific facts of this case, we find that sanctions are warranted because the Commission must protect the integrity of the EEO process and ensure that the Agency abides by its regulations. Even after AJ1 sanctioned the Agency with a default judgment for, in part, its production of an untimely investigative file, the Agency still issued its final decision over five months late. We find that the most appropriate sanction to address the Agency's conduct for issuing a late decision is to order the Agency to provide training to its EEO personnel who failed to comply with our regulatory timeframes. Furthermore, we affirm AJ1's finding of liability as a sanction.

Constructive Discharge Claim

An agency shall accept a complaint from any aggrieved employee, or applicant for employment, who believes that he has been discriminated against by that agency because of race, color, religion, sex, national origin, age, disability, or genetic information. 29 C.F.R. §§ 1614.103, 1614.106(a). Following the filing of Complainant's formal EEO complaint, the Agency accepted the complaint for investigation. The Agency defined the accepted allegation as follows:

Complainant, the former Federal Security Director (FSD), at the Jacksonville International Airport, in Jacksonville, Florida, alleges that he has been subjected to discrimination based on sex (male) and age (Y.O.B. 1957) when on or about May 9, 2014, the Agency issued him a direct reassignment to Des Moines International Airport, in Des Moines, Iowa, while replacing him with a younger, female FSD, who has minimal or no prior field experience.

While Complainant stated that the Agency's action was to "force" employees to retire, the accepted claim did not include that language. However, the Agency informed Complainant that if he did not believe that his claim was correctly identified, he should contact the Agency within five (5) calendar days of receipt of the Agency's letter, and to specify why he believed that the allegation was not correctly identified. Report of Investigation at 46. There is no indication that Complainant contacted the Agency to dispute the accepted claim. To the extent that the Agency argues that it initially erred when it failed to correctly identify Complainant's claim, Complainant disagrees and asserts that the claim was correct.

Additionally, a complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the AJ to amend a complaint to include issues or claims like or related to those raised in the complaint. See 29 C.F.R. § 1614.106(d). In this case, we find that Complainant did not request to amend his complaint, either with the Agency or AJ1. While we note that AJ1 included the sentence, "Complainant retired in lieu of having to move," immediately following the accepted claim, we do not find evidence that AJ1 accepted a constructive discharge claim.

We also find that it is inappropriate to reframe a claim after a decision has been issued, and there is insufficient evidence to show that the complaint should be processed as a mixed-case complaint. See Margeret M. v. Social Security Administration, EEOC Appeal Nos. 0120130304, 0120143010 (Jan. 16, 2013) (Commission declined to reframe a complainant's claim after Commission decisions had already been issued on the matter, and there was no new persuasive evidence to support complainant's request to reframe the claim). Here, AJ1 issued his decision on June 30, 2015, and the Agency filed its Motion to Dismiss Mixed Case Complaint and Motion to Stay Discovery on July 21, 2015. We find that Complainant's claim should not be reframed at this late stage in the EEO process, and as discussed above, there is no evidence to show that Complainant alleged a constructive discharge in his complaint. As such, we find that AJ2 erred when she determined that Complainant's claim should be processed as a constructive discharge claim, thereby making his complaint a mixed-case complaint and dismissing it for lack of jurisdiction. Accordingly, we VACATE AJ2's Dismissal Order and the Agency's subsequent final decision, and REMAND the matter back for a hearing on Complainant's damages and attorney's fees pursuant to finding of discrimination by AJ1.

CONCLUSION

We find that the Agency should be sanctioned for issuing a late final decision; and that AJ2 erred when she found that Complainant's complaint was a mixed-case complaint due to a constructive discharge claim and dismissed it for lack of jurisdiction. We also find that AJ1's sanction and finding of liability was proper. Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's responses, and arguments and evidence not specifically discussed in this decision, the Commission VACATES AJ2's Dismissal Order and the Agency's final decision, and REMANDS the matter to the Agency in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision is issued. 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 and issue a decision on Complainant's entitlement to damages and attorney's fees and other remedies 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.

Additionally, unless otherwise indicated, the Agency is ordered to complete the following remedial actions **within one hundred and twenty (120) days** of the date this decision is issued:

The Agency shall provide a minimum of four (4) hours in-person or interactive training to personnel in its Office of Civil Rights and Civil Liberties (OCRL) regarding their responsibilities concerning case processing.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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.

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 (R0610)

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 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. **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

March 13, 2020

Date