



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

████████████████████
Lenard T.,¹
Complainant,

v.

Chad F. Wolf,
Acting Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 0120181937

Hearing No. 460-2016-00049X

Agency No. HS-CBP-23914-2015

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 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., 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 VACATES the Agency's final decision, and REMANDS the matter for further processing.

ISSUE

The issue is whether the Administrative Judge's sanction to dismiss Complainant's hearing request was appropriate.

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

At the time of events giving rise to this complaint, Complainant worked as a Customs and Border Protection (CBP) Officer (GS-1895-12) at the Agency's Office of Field Operations, Houston Field Office, in Houston, Texas. Complainant contacted an EEO Counselor on May 6, 2015, and filed an EEO complaint on August 4, 2015, alleging that the Agency discriminated against him, and subjected him to a hostile work environment, on the bases of disability (bi-polar disorder), age (48), and in reprisal for prior protected EEO activity when:

1. Since approximately 2010, management did not recognize him for his work on the CBP Food Drive at the Port of Houston;
2. On August 15, 2014, management denied his first preference for assignment to the Global Entry Screening Unit, as part of the Bid, Rotation, and Placement (BRP) procedures, and assigned junior employees to back-fill the understaffed unit;
3. In February 2015, or April 2015, management did not select him for a collateral duty assignment in the Michael V. Gallagher Program;
4. On or around April 30, 2015, his supervisor (S1) denied his request to switch his off-day as a reasonable accommodation to attend a support group meeting;
5. On approximately April 30, 2015, S1 failed to refer him to the Privacy and Diversity Office (PDO) after he requested a reasonable accommodation;
6. On May 5, 2015, S1 did not approve his request for annual leave for that day until he reported to work;
7. On approximately May 5 and 7, 2015, another supervisor (S2) failed to refer him to the PDO, after he requested a reasonable accommodation;
8. On May 6, 2015, another supervisor (S3) assigned him to Hard Secondary, contrary to BRP procedure under the collective bargaining agreement, and failed to provide him with training for Hard Secondary, which he previously requested as a reasonable accommodation;
9. On May 6 and 18, 2015, S2 assigned him to Hard Secondary, contrary to BRP procedure under the collective bargaining agreement;
10. On May 29, 2015, another supervisor (S4) assigned him, via letter, to administrative duties, wherein his authority to carry a government-issued firearm was temporarily revoked, and S4 instructed Complainant to submit administratively acceptable medical documentation in order to return to full duties;

11. On approximately May 29, 2015, and continuing until April 2017, another supervisor (S5) removed him from the overtime list;
12. On approximately August 11, 2015, S5 ordered him to undergo a Fitness for Duty Examination (FFDE);
13. On August 12, 2015, S3 presented him with a letter, modifying the May 29, 2015, letter, wherein Complainant's authority to carry a government-issued firearm was temporarily revoked;
14. On August 30, 2015, he learned that management did not select him for the Peer Support Program;
15. On August 31, 2015, S3 and S4 held his reasonable accommodation request in abeyance pending the results of his FFDE;
16. On September 12, 2015, S4 ordered him to undergo a psychiatric examination as part of his FFDE;
17. In October 2015, another supervisor (S6) failed to respond to his email requesting training to become a Human Resources Specialist, level 1;
18. From December 2015 to April 2017, management required him to report to work, instructed him to sit in an empty office by himself, did not assign him any duties, and removed his name from the daily assignment roster;
19. On approximately December 1, 2016, management did not select him for the position of CBP Officer (Container Security-Team Lead), GS-1895-13, Pusan, South Korea (Vacancy Number MHCMP-1786959-IC); and
20. From January 16, 2017, and continuing, management failed to respond to his inquiries regarding the position of CBP Officer (Program Manager), GS-1895-13, Washington, D.C. (Vacancy Number MHCMP-1878010-ADF).²

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ).

On January 30, 2017, Complainant informed the parties that his then-attorney was hospitalized. The AJ responded that she would keep the matter on hold until his attorney's condition improved. On January 31, 2017, Complainant sent the AJ a nearly five-page email containing information about his pending case. The AJ responded via email, stating,

² We note that the Agency rearranged, and renumbered, the accepted claims in its final decision. For the purposes of this decision, we will refer to the claims as they are listed in the final decision.

I caution you to refrain from sending communications without your attorney's knowledge or consent (due to his hospitalization). You may unknowingly provide information which is damaging to the claims which are already pending before me. You should also refrain from cc'ing staff at [the Agency] which are not parties to the EEOC claim which is pending before me.

On March 9, 2017, Complainant's new attorney informed the AJ of his representation of Complainant. On April 24, 2017, the AJ issued an order amending Complainant's complaint, and ordering the Agency to conduct a supplemental investigation for the additional claims. Upon the completion of the Agency's supplemental investigation, the AJ resumed processing the complaint on January 31, 2018.

On March 1, 2018, Complainant sent an email to the EEOC's Office of Federal Operations (OFO) with "technical questions about process." Complainant noted that his case was not at the appellate stage, but at "first hearing." Complainant's email was forwarded to the AJ.

Also, on March 1, 2018, the AJ emailed the parties to inform them that the hearing was cancelled. The AJ stated that on January 31, 2017, she "cautioned" Complainant about communicating with her without his counsel's knowledge or permission, and that Complainant repeated this behavior in violation of her order. The AJ added that she would not accept or consider a request for reconsideration of her decision. Complainant's attorney responded that Complainant contacted OFO to ask a "technical question," and that he did not address the email to the AJ. Complainant's attorney requested a reconsideration, or the opportunity to file a pleading to explain the circumstances.

The AJ responded that she disagreed with the attorney's assessment of the situation, and she denied his request to file a pleading. The AJ stated that Complainant is represented by counsel, and she had previously instructed him to refrain from acting on his own. The AJ noted the attorney's objection, and "STRONGLY discouraged" any further response (emphasis in original). Complainant accidentally sent the AJ an email that was intended for his attorney, and quickly sent the AJ a follow-up email a few minutes later, asking her to disregard the email.

On March 5, 2018, the AJ dismissed Complainant's hearing request. The AJ stated that Complainant did not adhere to her January 31, 2017, order when he personally chose to contact OFO and divulged information which had to be disclosed to Agency counsel. Additionally, after being advised that the matter would be dismissed, Complainant and his attorney contacted the AJ, in violation of her order not to do so. The AJ noted that she previously informed Complainant that failure to comply with any order may result in sanctions in her January 22, 2016, Order of Acknowledgement and Case Management, and in her April 24, 2017, Remand Order, Scheduling Order, and Order on Initial Conference.

The AJ remanded the matter and ordered the Agency to issue a final decision. In its decision, the Agency procedurally dismissed claims 4-13,15, and 16, because those claims had been heard and decided by the Merit Systems Protection Board (MSPB).³ The Agency also found that management officials articulated legitimate, nondiscriminatory reasons for claims 2,3,11,14, and 17-20; and that Complainant had not shown that the reasons were pretext for discrimination. The Agency also concluded that the record was devoid of any evidence that management subjected Complainant to a hostile work environment.

CONTENTIONS ON APPEAL

Complainant's Contentions on Appeal

Through his attorney, Complainant argues that the AJ erred when she sanctioned Complainant by dismissing his hearing request. Regarding the AJ's January 31, 2017, email, Complainant argues that it was not written in formal pleading format, or identified as an order, and that the email was informal as evident from the language used and the closing line of "Thanks." Further, Complainant argues that the AJ "caution[ed]" Complainant, but did not "order" him, and it was not reasonably understood by Complainant to be an order.

Additionally, Complainant argues that the AJ "failed to adequately inform Complainant that she *ordered* him to refrain from contacting the EEOC on his own and without his attorney's permission or knowledge." Complainant notes that the Commission held that sanctions are improper for violating an order when the order is "sufficiently vague so as to justify confusion," citing Rountree v. Dep't of Treasury, EEOC Appeal No. 07A00015 (July 13, 2001).

Complainant also argues that an AJ "must issue a notice to show cause to the party for an explanation why the sanction should be not be imposed and provide an opportunity to cure the noncompliance before imposing the sanction," (quoting Rountree, supra). In this case, the AJ stated that she would "not accept or consider a request to reconsider this decision." Complainant asserts that the AJ's refusal to allow Complainant an opportunity to respond prior to issuing the sanction was improper, and an abuse of her authority.

Complainant further argues that the sanction to dismiss his hearing was too severe under the circumstances. Complainant asserts that not only was the AJ's guidance not an order, he did not violate it because he did not email the AJ or Agency staff. Complainant also notes that neither the hearing process, nor the responding agency, was prejudiced by Complainant's inquiry to OFO. Complainant requests that the case be remanded for a hearing on the merits.

Agency's Contentions on Appeal

The Agency argues that the sanction to dismiss Complainant's hearing request was appropriate because Complainant was aware of, and did not adhere to, the AJ's order.

³ MSPB Docket No. Da-0752-17-0304-I-1.

The Agency contends that the AJ properly tailored the sanction to Complainant's conduct, and it was not an abuse of her discretion. The Agency asserts that Complainant was on notice regarding the AJ's authority and intent to issue sanctions, and there were no extenuating circumstances to justify his behavior at issue. The Agency also argues that the sanction was specifically tailored to prohibit further "prejudicial outbursts," and it did not preclude the adjudication of Complainant's claims. The Agency requests that the Commission affirm its final decision.

ANALYSIS AND FINDINGS

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. Before sanctions are imposed, however, the Commission requires that the AJ issue an order to the offending party that makes clear that sanctions may be imposed, and the type of sanctions that could be imposed for failure to comply with the order, unless the party can show good cause for its action. Additionally, an AJ's order cannot be sufficiently vague so as to justify confusion. See Rountree, EEOC Appeal No. 07A00015.

In this case, we find that the AJ's sanction of dismissing Complainant's hearing request was not appropriate. In her dismissal order, the AJ found that Complainant did not adhere to her "January 31, 2017 order cautioning him against making contact without his attorney's knowledge or consent." However, we find that the AJ's January 31, 2017, email was sufficiently vague to confuse Complainant. Although the AJ *cautioned* Complainant "to refrain from sending communications without [his] attorney's knowledge or consent," she did not expressly prohibit him from doing so and did not use the term "order" in her email.

Additionally, Complainant did not understand the AJ's caution to refrain from sending communications to include OFO. We note that the AJ only specifically mentioned Agency staff "which are not parties to the EEOC claim," and there is no language in the email that would reasonably lead Complainant to understand that he should not contact OFO. As such, we find that the AJ's January 31, 2017, email was sufficiently vague to justify Complainant's confusion, and that the AJ's sanction to dismiss Complainant's hearing request for failure to obey an order was not appropriate.

CONCLUSION

The Commission VACATES the Agency's final decision and REMANDS the complaint to the Agency in accordance with this decision and the ORDER herein.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within 15 days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth herein that the complaint file has been transmitted to the Hearings Unit.

Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint, or issue a decision without a hearing, 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 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

January 24, 2020

Date