



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

[REDACTED]  
Carolyn M.,<sup>1</sup>  
Complainant,

v.

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

Request No. 2019004843

Appeal No. 0120191158

Hearing No. 480-2014-00681X

Agency No. 4F-956-0026-14

**DECISION ON REQUEST FOR RECONSIDERATION**

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Carolyn M. v. U.S. Postal Serv., EEOC Appeal No. 0120181158 (May 9, 2019). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

**BACKGROUND**

Complainant, a Sales, Services/Distribution Associate, PS-06, at the Agency's Downtown Station in Fresno, California, filed an EEO complaint in which she alleged that the Agency discriminated against her on the bases of race/national origin (African-American), color (Black), sex (female),

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<sup>1</sup> 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.

religion (Baptist), age (55), and in reprisal for prior protected EEO activity when, effective November 4, 2013, Complainant was removed from her position with the Agency.

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). Following the AJ's issuance of an order authorizing discovery by both parties, on January 15, 2015, the Agency filed a motion to sanction Complainant for her failure to provide an affidavit or other sworn statement indicating the factual bases of her claims of discrimination and retaliation, either during the investigation or in response to pre-hearing discovery requests that included a motion to compel:

The EEO investigator assigned to the case sent Complainant an affidavit to be completed accompanied by the warning that failure to submit the requested affidavit within fifteen days of receipt could result in dismissal for failure to cooperate (Affidavit says dismissed for failure to proceed). Complainant received a copy of the affidavit on April 21, 2014. IR 81. Complainant failed to return her affidavit. In discovery, the Agency asked Complainant to provide her completed and signed EEO affidavit. Complainant responded that she had no documents. The Agency completed its investigation despite Complainant's lack of cooperation in completing and returning the affidavit sent to her by the investigator despite the Agency's request that she do so in discovery. *It is well settled that when the Commission finds that a complainant has not cooperated in the hearing process, absent a finding of contumacious conduct, the appropriate sanction is to dismiss the hearing request.* [Emphasis added.] Complainant failed to participate in the investigation of her complaint and should accordingly be sanctioned by having her request for a hearing dismissed.

On February 4, 2015, Complainant and her representative responded to the Agency's motion for sanctions. She stated that she never received the motion to compel and that she saw no need to respond to redundant questions as the investigative file contained everything except testimony from her witness.

The AJ dismissed the hearing request and remanded the matter to the Agency after Complainant failed to comply with the AJ's orders. The AJ noted that despite being represented by a "seasoned EEO litigator," Complainant refused to adequately respond to requests for relevant information and was on notice that her failure to do so could result in dismissal of her hearing request. As Complainant's response was not responsive to the motion and lacking the material and information requested, the AJ dismissed the hearing request and remanded the matter for a final agency decision. The Agency subsequently issued a final decision finding no discrimination or reprisal.

On appeal, the Commission affirmed the Agency's final decision. In our appellate decision, we initially determined that the AJ did not abuse his discretion by dismissing the hearing request. The Commission found that Complainant refused to provide requested information about her complaint during the investigation and in response to the Agency's discovery requests.

Further, the Commission found that Complainant failed to provide adequate justification for her failure to provide the requested information. The Commission determined that Complainant and her representative were on notice that failure to provide the requested information could result in the possible sanction of dismissal of her hearing request. Accordingly, the Commission concluded that the AJ was justified and did not abuse his discretion by dismissing the hearing request as a sanction.

### ANALYSIS AND FINDINGS

In her request for reconsideration, Complainant reiterates the arguments she previously presented on appeal. After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. However, in the interest of fairness, the Commission will take this opportunity to review the AJ's issuance of sanctions in this matter.

The Commission's regulations confer upon its AJs very broad responsibility for adjudicating an EEO complaint once a complainant's hearing request has been granted, and that responsibility gives the AJs wide latitude in directing the terms, conduct, or course of EEO Administrative hearings. Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). The AJ's discretionary authority includes the power to impose sanctions upon a party that fails to comply with his or her orders. 29 C.F.R. § 1614.109(f)(3). Such sanctions may include an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information, exclusion of other evidence offered by the party refusing to provide the requested information, or issuance of a decision fully or partially in favor of the opposing party, or other actions, as appropriate. Id.

While a party charging an AJ with abuse of authority to sanction faces a very high bar, that authority is not without limits. Chere, supra. Sanctions can be used to both deter the non-complying party from similar conduct in the future and to equitably remedy the opposing party. Robert A. v. U.S. Postal Serv., EEOC Appeal No. 0120182698 (Feb. 21, 2020). To achieve a proper balance between these considerations, it is necessary to apply the least severe sanction needed to respond to the party's failure to show good cause for its actions. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120101994 (Jan. 14, 2014).

In other words, sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. Chere, supra. 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 in justice, 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. Id.

Dismissal of a hearing request by an AJ as a sanction is only appropriate in extreme circumstances, such as when the complainant engages in contumacious conduct, not merely negligence. See Schoenrogge v. Dep't of Justice, EEOC Appeal No. 0120130893 (May 20, 2013) citing Thomas v. Dep't of Transp., EEOC Appeal No. 01870232 (Mar. 4, 1988) (dismissal of hearing request appropriate where the complainant engaged in contumacious conduct that included repeated failure to comply with discovery obligations and serious abuse of process by filling voice mail boxes of AJ and Agency Counsel with erratic, lewd, and vulgar messages regarding his complaint to the point where intervention of the Federal Protective Service and local police was necessary); Robert A., *supra* (dismissal of hearing request upheld where complainant failed to respond to order to show cause and did not provide evidence that he was incapacitated and unable to comply with the AJ's order).

Consequently, if a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, an AJ may be abusing his or her discretion by dismissing the complaint. See Georgianne B. v. Dep't of Agric., EEOC Appeal Nos 0120181591 & 0120181592 (Feb. 27, 2020) (dismissal of hearing request rejected on appeal where AJ dismissed hearing request outright rather than grant Agency's motion to compel discovery or limiting the complainant's discovery when the complainant failed to appear at the initial conference and failed to respond to a discovery request despite the fact that the parties and the AJ remaining in continuous email correspondence in an effort to litigate the case); Drucilla Y. v. Dep't of the Treasury, EEOC Appeal No. 0120182728 (Feb. 27, 2020) (dismissal of hearing request rejected on appeal where the complainant made earnest but unsuccessful effort to comply with an onerous acknowledgement and scheduling order); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000) (dismissal of hearing request rejected on appeal where the complainant failed to return a designation of hearing form but informed the hearings office by phone that she was searching for an attorney and requested more time for discovery).

Upon review, the Commission finds that the AJ's sanction in the form of dismissing the hearing request was too harsh under the specific circumstances presented in this case. It is true that Complainant failed to provide an affidavit to the Agency and failed to respond to the Agency's request to provide a sworn statement during discovery. It is also true that nearly three years had passed between the Agency's February 2015 motion to sanction and the AJ's November 2017 order dismissing Complainant's hearing request. However, unlike the complainant in Schoenrogge, an individual who really did engage in contumacious conduct that seriously jeopardized the processing of the complaint as well as the integrity of the administrative process, Complainant apparently believed that she was being asked to resubmit answers to questions that she had already answered. In addition, the Agency has not made any showing that the three-year dormancy of the case was due to Complainant's failure to provide an affidavit or sworn statement. Indeed, the fact that the Agency was able to complete its investigation even without Complainant's affidavit leads us to believe that the integrity of the process had not been seriously compromised. This is not to say that the AJ erred in ordering a sanction. Complainant did hold up the processing of her complaint. Rather, applying the five factors listed above, the sanction that the AJ imposed, dismissal of Complainant's hearing request, was too severe to address the underlying conduct.

We further find that either excluding evidence or drawing an adverse inference against Complainant might have been more appropriate under the circumstances presented by this case. On remand, we advise the AJ to consider imposing a lesser sanction, including those just mentioned, to appropriately address the conduct at issue. Accordingly, we will vacate the Agency's final decision and remand this matter for a hearing in accordance with our Order below.

### CONCLUSION

After a careful review of the record, including Complainant's arguments on request for reconsideration, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission DENIES Complainant's request for reconsideration as it fails to meet the criteria of 29 C.F.R. § 1614.405(c). However, in the interests of fairness and preserving access to the EEO process, the Commission VACATES both the previous appellate decision in EEOC Appeal No. 0120181158 and the Agency's final decision (Agency No. 4F-956-0026-14) and REMANDS the matter to the Agency for further action in accordance with this decision and the Order below.

### ORDER

The Agency shall submit to the Hearings Unit of the EEOC San Francisco District Office a request for a hearing within 15 calendar days of the date this decision is issued. The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within 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 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.

#### COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)

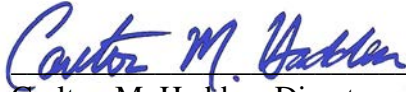
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

March 10, 2020

Date