



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

[REDACTED]
Vaughn L.,¹
Complainant,

v.

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

Appeal No. 2019005104

Hearing No. 450-2018-0007X

Agency No. 4G-752-0143-17

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 June 6, 2019 final decision concerning an equal employment opportunity (EEO) complaint claiming 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.

BACKGROUND

During the period at issue, Complainant worked as a Manager, Customer Service, at the Agency's Dallas-Medrano Station in Dallas, Texas.

On June 19, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him in reprisal for prior protected EEO activity (Agency No. 4G-752-0173-16). By letter dated July 10, 2017, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following claims:

1. from February 4-8, 2017, management did not input FMLA leave as requested; and

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. management did not act upon Complainant's ELD IDP submission causing negative actions for upward mobility.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing.

On April 15, 2019, the AJ issued an Order to Show Cause. Therein, the AJ stated that the parties were notified of the scheduling of an Initial Conference to be held on May 2, 2019. In preparation, Complainant was ordered to submit an Initial Conference report by March 26, 2019. Complainant, who was represented by counsel, failed to submit the Initial Conference Report by the March 26 deadline or to request an extension. The AJ ordered Complainant to show cause why the AJ should not send this complaint for a final agency decision for failure to prosecute.

On April 21, 2019, the Complainant's attorney responded to the AJ's Show Cause Order. Therein, he stated that he did not intentionally violate the AJ's Order. He explained that he had contacted the AJ about rescheduling the May 2 Initial Conference due to a scheduling conflicts and the AJ instructed him to consult with the Agency to agree upon alternate dates. Based on that, he stated he believed, "[the] subsequent rescheduling of the conference would likewise result in a rescheduling of all related deadlines." Complainant's attorney stated that on April 12, 2019, he contacted Agency counsel to discuss alternative dates for the Pre-hearing conference (May 13-15, 2019). Complainant's attorney asserted that he notified the AJ of the mutually agreeable alternative dates for the Pre-hearing conference and that the Agency did not object to Complainant's request to file his Initial Conference Report by May 7, 2019.

On May 1, 2019, the AJ issued an Order of Dismissal remanding the matter to the Agency to issue a final decision.² The AJ reasoned that Complainant did not request an extension of time to submit an Initial Conference Report and that the rescheduling of the conference was not actually granted because Complainant had not provided the alternative dates in a timely manner.³

On June 6, 2019, the Agency issued a final decision finding no discrimination. The Agency reasoned that it articulated legitimate, nondiscriminatory reasons for its actions which Complainant failed to establish was pretext for retaliation.

² The AJ's May 1, 2019 Order of Dismissal was for EEOC Hearing No. 450-2017-00115X, Agency Case No. 4G-752-0173-16 and EEOC Hearing No. 450-2018-0007X, Agency Case No. 4G-752-0143-17. Complainant, on appeal, only references EEOC Hearing No. 450-2018-0007X, Agency Case No. 4G-752-0143-17 and only includes a final decision for that case. Thus, we will not address herein EEOC Hearing No. 450-2017-00115X, Agency Case No. 4G-752-0173-16 because that matter is not currently before us.

³ It is unclear from the record before us if Complainant was ordered to submit to the AJ the alternative dates for the Initial Conference by a specified date.

The instant appeal followed.

ANALYSIS AND FINDINGS

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.

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 certain 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 Transportation, EEOC Appeal No. 01870232 (March 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 hearing request. 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 (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).

Complainant, in the instant matter, did not submit an Initial Conference report by March 26, 2019. Complainant's attorney, however, stated that he thought these dates would be revised based on a new date for the Initial Conference. We concur with the AJ that the extension for the Initial Conference had not been officially granted at that time. Thus, we concur a sanction was in order. However, as previously emphasized, dismissal of the hearing request should be avoided absent the most egregious of circumstances. The AJ should have chosen from among several less severe sanctions such as excluding evidence offered by Complainant or drawing an adverse inference against Complainant based on his failure to submit his Initial Conference Report by the assigned deadline. On remand, we advise the AJ to consider imposing a lesser sanction, including those just mentioned, to appropriately address the conduct at issue.

We VACATE the Agency's final decision and REMAND the matter for a hearing in accordance with the ORDER below.

ORDER

Within 15 calendar days of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC's St. Louis District Office a renewed request for a hearing, as well as a copy of the complete complaint file and this appellate decision. 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.

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)

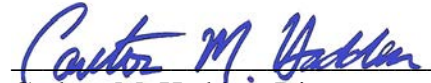
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

August 20, 2020
Date