



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

[REDACTED]
Jane R.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2019005264

Hearing No. 440-2019-00140X

Agency No. 200J-0537-2018105940

DECISION

On August 13, 2019, 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 undated 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission VACATES the Agency's final decision and REMANDS this matter for a hearing.

BACKGROUND

Complainant worked as an Advanced Medical Support Assistant, GS-0679-06, at the Jesse Brown Medical Center in Chicago, Illinois. Complainant filed a formal EEO complaint on September 29, 2018 (and later amended), in which she alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of sex (female), disability and in reprisal for prior protected EEO activity when:

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.

1. Beginning on August 3, 2018, and continuing through the present, the Supervisory Medical Support Assistant, in opposition of her reasonable accommodation, directed Complainant to relocate to office space on the first floor which exacerbates her medical condition. Supervisor(s) accused Complainant of being insubordinate and forced her to sign a document under duress stating she would work where the supervisor(s) assigned her to work;
2. On September 12, 2018, Complainant was issued a one-day suspension; and
3. Effective November 14, 2018, Complainant was assigned to the first floor Gold Clinic; and on or about October 23, 2018, a Report of Contact was filed against her when she was accused of leaving patients standing in line.

After completing its investigation, the Agency provided Complainant with a copy of the investigative file and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. In an order dated May 8, 2019, the AJ scheduled the initial conference for June 19, 2019. The AJ ordered Complainant to submit the following evidence prior to the initial conference, summarized as follows:

1. All evidence that the responsible managing official(s) considered Complainant's sex, disability, and prior EEO activity.
2. All evidence that the responsible management officials and/or selecting officials were aware of Complainant's sex, disability, and prior EEO activity.
3. All direct evidence of discrimination based on sex, disability, and reprisal for prior EEO activity.
4. All comparators with the same supervisors who were treated more favorably, including information pertaining to their sex, disability, and prior EEO activity.
5. All employees supervised by the responsible management officials who were directed to relocate their work area, failed to do so, and were not accused of insubordination, sign an agreement to work where assigned by their responsible management official, and not subject to discipline.
6. All evidence that refutes the Agency's claim that Complainant was asked to relocate her work area in August 2018 based on the operational needs of the facility.

The AJ's order included the following warnings:

Complainant must participate in the initial conference call. Failure to comply with these instructions may result in sanctions, including dismissal of the request for

hearing. The [documents listed above] are due to the AJ no later than June 10, 2019, with a copy to the opposing party.

Deadlines will not be extended absent a timely request, in writing, prior to the deadline showing good cause for the extension. Complainant's failure to obtain representation *** does not typically constitute good cause. *** Failure to follow the orders of the AJ or to comply with the Commission's regulations may result in sanctions. See 29 C.F.R. §1614.102(f)(3).

Sanctions for failure to follow orders: If Complainant fails to timely comply with the Administrative Judge's orders or the Commission's regulations or fails without good cause to timely appear and to proceed for any scheduled proceeding the request for a hearing may be dismissed.

Complainant failed to submit the required documentation by the assigned deadline of June 10, 2019. On June 11, 2019, the AJ canceled the pre-hearing conference and issued an order to show cause, the pertinent parts of which are reproduced as follows:

To date, Complaint has failed to file a response, which includes other requested evidence, which was due by June 10, 2019; and she has failed to request an extension of time to file the same. *** Complainant is hereby ordered to show cause (explain) why sanctions should not be imposed for her failure to follow the May 8, 2019 Order of the AJ which required her to provide the requested evidence to the AJ by June 10, 2019. Complainant is ordered to respond to this show cause order by June 21, 2019. *** If Complainant fails to respond to this order or fails to provide legally sufficient reasons to justify her failure to follow the orders of the Administrative Judge or otherwise prosecute her case, the imposition of sanctions, including dismissal of her hearing request may result.

On June 20, 2019, Complainant responded to the show cause order, in pertinent part, as follows:

Complainant requests not to be sanctioned with a dismissal. Dismissals are warranted only in extreme circumstances where Complainant is being willfully disobedient or "contumacious." Complainant engaged in, at most, simple negligence. Complainant overlooked the requirement at the bottom of page 2 of the initial order requiring that certain documents be provided by June 10, 2019. Complainant was in the process of hiring Counsel and the undersigned did not receive the order until after the deadline had passed and the show cause order issue. After discussion with Complainant, it appears that Complainant, being pro se at the time, was confused about the procedure.

On June 24, 2019, the AJ issued an order dismissing Complainant's hearing request. Therein, the AJ stated:

I find that Complainant has engaged in behavior that shows a lack of cooperation, and a failure to comply with the AJ's orders. Complainant failed to provide the requested information to the AJ by June 10, 2019 as ordered. As noted by Complainant, she overlooked this requirement and was confused by the process, but that is no legal excuse, nor is her delay in retaining counsel. Complainant appears not to have attempted to retain counsel until after she received the June 11, 2019 order to show cause. Complainant's request for a hearing is dated March 14, 2019. Therefore Complainant had sufficient time to retain a legal representative before and after May 8, 2019 *** The proper sanction to impose is dismissal of the hearing request and to remand the case for a final decision on the merits.

In accordance with the AJ's dismissal order, 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

In her appeal brief dated August 13, 2019, Complainant, through Counsel, argues:

Complainant engaged in at most simple negligence. Complainant overlooked the requirement at the bottom of page (2) of the initial order requiring that certain documents be provided by June 10, 2019. This was a simple mistake, not an egregious and willful disobedience. Complainant explained that she could assure the Commission that procedural mishaps will not occur again with her newly-hired counsel. Her attorney explained that he is prepared to conduct a status conference at the earliest possible date and requested leave to promptly provide the information requested by the AJ.

ANALYSIS AND FINDINGS

Standard of Review

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, (hereinafter "MD-110") 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").

The AJ's Dismissal of the Hearing Request as a Sanctions

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 orders. Id. When the complainant *** fail[s] without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances: (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information; (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) Exclude other evidence offered by the party failing to produce the requested information or witness; (iv) Issue a decision fully or partially in favor of the opposing party; or (v) Take such other actions as appropriate. 29 C.F.R. § 1614.109(f)(3).

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 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). 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.

In applying the first factor, we find that Complainant's non-compliance consisted solely of failing to submit the various prehearing evidentiary documents by the assigned deadline of June 10, 2019. As justification for her noncompliance, Complainant acknowledged that she had mistakenly overlooked the requirement set forth on the bottom of page (2) of the initial order that set forth the June 10, 2019 deadline. She also stated that she was confused about the process and was in the process of hiring counsel. The record indicates that Complainant retained her attorney sometime between the June 10, 2019 deadline and June 20, 2019. In applying the second and third factors, we find that since this was only a single incident of non-compliance, the delay, if any, would have been minimal had the AJ not cancelled the prehearing conference outright, rather than grant Complainant's Counsel the continuance needed to comply with the AJ's order as soon as practicable after he took over the case. In applying the fourth factor, we find, as previously noted, that there were no incidents of non-compliance attributable to Complainant other than her failure to submit the prehearing documentation to the AJ by June 10, 2019.

In applying the fifth factor, we have consistently held in recent decisions that dismissal of a hearing request as a sanction is only appropriate in extreme circumstances. One such circumstance is when the complainant engages in contumacious² conduct, not merely negligence. Cassey B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004838 (Sept. 24, 2020); Cecile T. v. Dep't of the Treasury, EEOC Appeal No. 2019002373 (Sept. 22, 2020); Carolyn M. v. U.S. Postal Serv., EEOC Request No. 2019004843 (March 10, 2020). Examples of contumacious conduct warranting dismissal of hearing requests include: Charlie K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019002293 (Sept. 22, 2020) (failure to provide investigative affidavit during agency investigation and failure to provide answers to interrogatories during discovery despite being granted multiple extensions in both phases of the proceeding, as well as failure to appear at pre-hearing conference); and Cleo S. v. U.S. Postal Serv., EEOC Appeal No. 0120181406 (Feb. 28, 2020) (failure to participate in email communications being sought by the Agency and to produce documentation ordered by AJ in a manner demonstrating disregard for administrative process and unwillingness to comply with AJ's orders despite warning of consequences). Absent a showing of contumacious conduct, hearing requests may be dismissed where the complainant fails to pursue his or her claim with due diligence. Alice S. v. Soc. Sec. Admin., EEOC Appeal No. 2019002475 (Sept. 22, 2020) (failure to respond to emails from AJ that included initial conference order and order to show cause due to overlooking those emails); Robert A. v. U.S. Postal Serv., EEOC Appeal No. 0120182698 (Feb. 21, 2020) (failure to respond to order to show cause despite having received order from AJ via email, and failure to provide evidence that he was incapacitated and unable to comply with the order).

In other words, there must be a showing that Complainant either willfully disobeyed the AJ's orders or unreasonably failed to respond to those orders in order to justify dismissal of the hearing request as a sanction. In the absence of either circumstance, we cannot as a matter of law find that the integrity of the administrative EEO complaints process had been so compromised as to warrant the most severe sanction. When a lesser sanction would have normally sufficed to deter the conduct and to equitably remedy the opposing party, we have held that the AJ had abused his or her discretion by dismissing the complaint in the absence of a clear showing of contumacious conduct on the part of the complainant. 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).

²The relevant meaning of the word contumacious is willfully and obstinately disobedient. <https://www.dictionary.com/browse/contumacious>.

With these considerations in mind, we find that Complainant's failure to submit the required documents to the AJ was the result of an oversight on her part that her newly-retained attorney attempted to correct. Additionally, Complainant's delay in hiring counsel until just before the deadline is not contumacious conduct. We can find no evidence that Complainant had engaged in or exhibited the kind of willful or obstinate refusal to comply with an AJ's orders that typifies contumacious conduct. Such behavior was clearly present in Charlie K., and Cleo S. but lacking in Georgianne B. and Drucilla Y. Likewise, we do not find that Complainant willfully failed to act with due diligence with respect to communications from the AJ and the Agency concerning the hearing, as was the situation in Alice S. and Robert A. Rather, the worst that could be said about Complainant is that she was negligent in overlooking the June 10th deadline. No evidence of anything other than her explanation was adduced. We therefore find that the AJ's dismissal of Complainant's hearing request was too harsh a sanction. Any one of the lesser sanctions listed in subsections (i), (ii), or (iii) of section 109(f)(3) would be appropriate to address Complainant's noncompliance with the AJ's prehearing conference scheduling order dated May 8, 2019.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Commission VACATES the Agency's final decision and REMANDS the matter to the Agency for further action 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 in Chicago, Illinois, within fifteen (15) calendar days of the date this decision is received. 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 take 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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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).

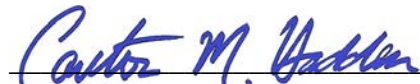
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

December 29, 2020

Date