



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

[REDACTED]
Sofia W.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2019001779

Hearing No. 410-2018-00183X

Agency No. IRS-17-0414-F

DECISION

On February 18, 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 January 15, 2019 final order 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 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 order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Internal Revenue Agent, GS-0512-11, at the Agency's Small Business/Self Employed (SB/SE) Division in Atlanta, Georgia. On June 21, 2017, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American) and age (41) when the Agency did not select her for the following positions:

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. Internal Revenue Agent (IRA), General Program, Vacancy Announcement No. 17CS4-SBB0001-0512-12-PC;
2. IRA, General Program, Vacancy Announcement No. 17CS4-SBB0002-0512-13-PC;
3. IRA, Abusive Transaction Technical Issues (ATTI), Vacancy Announcement No. 17CS4-SBB0005-0512-12-PC;
4. IRA, Special Enforcement Program (SEP), Vacancy Announcement No. 17CS4-SBB0003-0512-12-PC; and
5. IRA, SEP, Vacancy Announcement No. 17CS4-SBB0006-05112-13-PC.

At the conclusion of the investigation, Complainant was provided a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On August 15, 2018, the AJ assigned to the matter issued an Order on Initial Conference. In the Order, the AJ advised the parties that they were required to submit their witness and exhibit lists seven days from any Response to a Motion for Summary Judgment or no later than September 24, 2018. The Agency timely submitted its witness and exhibit list, but Complainant failed to submit one. On November 5, 2018, the AJ issued Complainant an Order to Show Cause (OSC). In the OSC, the AJ directed Complainant to explain, by November 20, 2018, why she did not submit a witness and exhibit list. Complainant timely submitted a response. On November 28, 2018, the AJ issued an Order of Dismissal dismissing Complainant's request for a hearing, finding Complainant provided inadequate justification for her failure to submit a witness and exhibit list in violation of the AJ's orders.

The Agency subsequently issued a final decision finding Complainant had not proven she was discriminated against as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that dismissal of her hearing request as a sanction was improper. Complainant explains that, at the time, she was prosecuting her case *pro se* and did not have legal assistance. Complainant received the Agency's exhibit and witness list, determined that she had no additional witnesses or exhibits to put forth, and concluded that she did not need to submit such lists of her own. Complainant argues that the AJ's conclusion that the Agency needed to spend time and resources preparing its own witness list is irrelevant to the question of sanctions because the Agency was obligated to do so anyway. Complainant further argues that her inaction did not delay the proceedings or cause prejudice because she remedied the matter one day after the AJ's OSC and the Agency was able to mount its defense because she did not add to the Agency's lists. Complainant does not believe that her inaction compromised the integrity of the EEO process.

In addition, Complainant argues that the preponderance of the evidence establishes that she was subjected to discrimination. Accordingly, Complainant requests that the Commission reverse the final decision and remand the matter for a hearing.

ANALYSIS AND FINDINGS

The AJ's Issuance of 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 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.

The Commission has held repeatedly that sanctions must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. See Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007); Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000). The Commission's interest lies in deterring the underlying conduct of the non-complying party and protecting its administrative process from abuse by either party to ensure that agencies, as well as complainants, abide by its regulations. See Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). The factors pertinent to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted, include the following: (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; and (4) the effect on the integrity of the EEO process. Id.; see also Gray, EEOC Appeal No. 07A50030; Vovsest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005).

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 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. v. U.S. Postal Serv., EEOC Appeal No. 0120182698 (Feb. 21, 2020) (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).

Taking these factors into consideration, we find that the sanction of dismissing the hearing request under the circumstances presented in this case was too harsh. As Complainant explained, the Agency's witness and exhibit lists encompassed the witnesses and exhibits she planned to use and therefore she did not believe a submission of her own was necessary. When informed by the AJ that she failed to comply with the deadline for submitting witness and exhibit lists, Complainant promptly submitted a response. The non-compliance amounted to failure to submit a witness and exhibit list identical to the Agency's. By declining to add to the Agency's list, the Agency did not suffer prejudice; absent a witness and exhibit list from Complainant, the Agency would prepare for a hearing based on its own lists. Only if Complainant sought to add witnesses or exhibits at a later date would the Agency have grounds to argue prejudice. As the Agency's motion for summary judgment was still pending, there has been no showing that a delay in justice occurred. While the EEO process is well served by parties adhering to deadlines and the EEOC's regulations, we cannot find under the circumstances present that the integrity of the process has been seriously compromised.

Applying the factors listed above, the sanction that the AJ imposed, dismissal of Complainant's hearing request, was too severe to address the underlying conduct. On remand, we advise the AJ, if a sanction is even warranted at all in the instant matter, to consider imposing a lesser sanction 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

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final decision and REMANDS the matter to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency shall submit to the Hearings Unit of the EEOC Atlanta 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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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](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, a 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

February 2, 2021
Date