



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

[REDACTED]
Sylvester C.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Great Lakes Area),
Agency.

Appeal No. 2019004212

Hearing No. 560-2017-00045X

Agency No. 4J-630-0067-16

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 May 29, 2019 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. For the following reasons, the Commission VACATES the Agency's final decision and REMANDS this matter for a hearing.

BACKGROUND

Complainant worked as a City Letter Carrier, Q-01, at the Agency's Coyle Branch Post Office in St. Louis, Missouri. On May 13, 2016, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the bases of race (Caucasian), color (White) and reprisal (prior EEO activity) by placing him in an emergency off-duty status without pay on March 8, 2016 and by issuing him a notice of removal dated June 13, 2016.

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.

After completing its investigation, the Agency provided Complainant with a copy of the investigative file and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. In an order dated February 1, 2018, the AJ scheduled an initial conference for February 20, 2018. This order notified the parties of the following:

(2) Complainant and/or [his] representative must notify both the Administrative Judge and Agency Counsel of the telephone number(s) where [they] may be reached for the Initial Conference. Failure to notify Agency Counsel and the Administrative Judge of the telephone number where [they] may be reached for the Initial Conference may be deemed a failure to comply with an administrative judge order and could result in sanctions up to and including the loss of the right to a hearing. ***

(6) The Parties are also hereby notified that failure to follow this order or other orders of the Administrative Judge may result in sanctions *** [including]: *** (e) take such other actions as appropriate including the denial of the right to a hearing.

On March 28, 2018, the Agency filed a motion for summary judgment, which the Administrative Judge denied in a subsequent Scheduling Notice and Order dated February 12, 2019. This order also stated:

A prehearing telephone conference will be held telephonically on March 25, 2019, at 11:00 AM Central time. *** Failure to be available/appear as indicated without the approval of the AJ may result in cancellation of the hearing. The hearing would be scheduled for April 29, 2019. The parties will each submit a pre-hearing report to the AJ and the opposing party five days before the pre-hearing conference that includes: statement of the issue; material facts stipulated; witnesses; list of proposed exhibits.

On February 25, 2019, the Agency filed a motion to reschedule the hearing to May 20, 2019, which the AJ granted.

On March 25, 2019, the AJ issued Complainant a show cause order. The AJ stated in the order that she did not receive a prehearing statement from Complainant and that Complainant could not be reached by telephone for the conference call. The AJ cancelled the hearing scheduled for May 20, 2019 until further notice. In addition, the show cause order stated:

Complainant is hereby ORDERED to Show Cause as to why this Administrative Judge should not send this complaint for a final agency decision for failure to prosecute pursuant to EEOC Regulations at 29 C.F.R. § 1614.109(b). Complainant must provide legitimate reasons for the failure to submit a prehearing statement and failure to attend the prehearing conference. Complainant is granted 10 days to

respond to this order. Failure to provide just cause or respond to this Order will result in the denial of a hearing and a request for a final agency decision.

In an order dated April 2, 2019, the AJ dismissed Complainant's hearing request due to Complainant's failure to comply with her orders. The AJ reported that on March 27, 2019, she received an email from Complainant responding to her March 25, 2019 show cause order stating that "as an average citizen, email notifications can be buried in the massive junk emails received on a daily basis." The order further stated:

Complainant provided his personal email address with his hearing request and in response to the January 31, 2107 (sic) Notice of Receipt which was issued to the parties. Therefore, communications with the parties, including the Initial conference and various other communications, have been via email. Complainant also utilized this same email address to respond to the Order to Show Cause. At no time did the Complainant advise the undersigned that he was having any difficulty receiving emails, nor did he request receipt of documents or information via U. S. mail.

Accordingly, Complainant's inability to find the Scheduling Order with his email does not, as a matter of law, constitute good cause for failing to file a Prehearing Report and failing to appear for the Prehearing Conference.

The AJ remanded the matter to the Agency for a final agency decision. The Agency subsequently issued a final decision finding no discrimination.

CONTENTIONS ON APPEAL

In his appeal statement dated May 28, 2019, Complainant argued:

In 2018, the EEOC judge requested pre-hearing statements and I submitted everything I had to her [when] a settlement conference was scheduled *** [The AJ said] she would schedule a hearing. I waited and waited and evidently missed her email. It wasn't [until] 3 days before the meeting that I received a priority mail from the Agency wanting to reschedule the hearing date. I sent Agency Counsel an email agreeing to the date change. Nothing was said about the preliminary hearing. I missed the hearing and my case was remanded to the [Agency] for a final agency decision. I feel something as important as that should have been sent through the US mail.

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 Sanction

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.

Applying the first factor, the non-compliance consisted of Complainant's failure to submit his prehearing report by March 20, 2019, five days before the prehearing conference scheduled for March 25, 2019. Complainant's justification for the non-compliance, as set forth in his appeal statement, was that he believed that he had sent all of the necessary prehearing submissions to the AJ in 2018.

Applying the second and third factors, the hearing that was originally scheduled for April 29, 2019 was rescheduled to May 20, 2019. We cannot ascertain whether there was any appreciable delay in the proceeding or if there was, whether Complainant's failure to submit his prehearing statement by the assigned deadline was the cause of that delay. Applying the fourth factor, there appears to be only this single incident of non-compliance.

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); 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 if 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 unjustifiably 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 find that the integrity of that process had been so compromised as to warrant the most severe sanction.

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

When a lesser sanction would normally suffice to deter the conduct and to equitably remedy the opposing party an AJ may be abusing his 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).

With the foregoing considerations in mind, we find that Complainant's appeal statement reflects his belief that he had already sent the AJ the prehearing statement that she had asked for. There also appears to have been a breakdown in communications, particularly through email, regarding whether Complainant received the AJ's notification about the prehearing conference. There does not appear to be any indications that Complainant had engaged in the kind of willful or obstinate refusal to comply with an AJ's orders that typifies contumacious conduct. Such behavior was clearly present and on display 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 he was negligent or mistaken in failing to respond to communications from the AJ and the Agency. 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 likely be more appropriate to address Complainant's noncompliance with the AJ's order to submit a prehearing statement by March 20, 2019. Moreover, as demonstrated by the AJ's denial of the Agency's motion for summary judgment, there exists an outstanding genuine issue of material fact regarding exactly what had transpired between Complainant and CSS on March 8, 2016. The only way to resolve that issue is to assess the credibility of CSS and the other management witnesses, and the most efficient way to do that is to hold a hearing.

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 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 Saint Louis, Missouri, 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.

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>. 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).

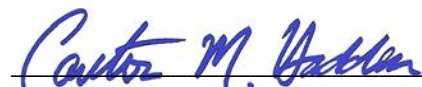
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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