



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

[REDACTED]
Paul F.,¹
Complainant,

v.

David Pekoske,
Acting Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2019005369

Hearing Nos. 410-2017-00177X; 410-2017-00329X; 410-2017-00430X

Agency Nos. HS-TSA-25290-2016; HS-TSA-25920-2016; HS-TSA-26918-2016

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 September 13, 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

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer (TSO), SV-1802-E Band, at Hartsfield Jackson International Airport in Atlanta, Georgia.

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.

On February 17, 2016, Complainant filed an EEO complaint (Agency No. HS-TSA-25290-2016) wherein he claimed that the Agency discriminated against him in reprisal for his prior protected EEO activity when:

1. On October 28, 2015, management issued him a Notice of One-Day Suspension.

On May 23, 2016, Complainant filed a second EEO complaint (Agency No. HS-TSA-25920-2016) wherein he claimed that the Agency discriminated against him in reprisal for prior protected EEO activity when:

2. On February 8, 2016, he was issued a Pre-Decisional Letter.

On November 3, 2016, Complainant filed a third EEO complaint (Agency No. HS-TSA-26918-2016) wherein he claimed that the Agency discriminated against him and subjected him to a hostile work environment in reprisal for prior protected EEO activity when:

3. On July 12, 2016, management removed him from his station;
4. On July 26, 2016, management accused him of not being proficient; and
5. On August 8, 2016, management refused to allow him to work in the oversized location.

The management officials identified by Complainant included three supervisory TSOs and a Transportation Security Manager.

The Agency investigated each complaint separately and thereafter provided Complainant with copies of each investigative file and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested hearings, pursuant to which all three complaints were assigned to a single AJ on November 15, 2018. The AJ scheduled a status conference to be held via telephone on December 12, 2018. The AJ's order specified that a party's failure to follow any part of this order could result in sanctions being imposed pursuant to 29 C.F.R. §1614.109(f)(3). Due to the illness of Complainant's representative, the conference was ultimately rescheduled for February 5, 2019. At the conference, the AJ ordered among other things that the parties submit their pre-hearing statements no later than May 22, 2019.

On June 4, 2019, the AJ issued an Order to Show Cause that Complainant timely and adequately respond as to why Complainant failed to comply with the February 5, 2019 Order on Status Conference, Deadlines, and Record Completion, which directed the parties to submit their Pre-Hearing statements no later than May 22, 2019.

On June 14, 2019, Complainant, through his representative, submitted the following response to the AJ's Order to Show Cause:

Complainant is a single father of two teenage children. In February 2019, Complainant's mother fell terribly ill; therefore, Complainant became his mother's primary caretaker. At that time, Complainant became responsible with getting his mother to doctor appointments, ensuring she was taking the proper medications at all times, and being available for his two children to help with homework and ensure they were attended to as his court order custody arrangements stated. This situation made it difficult for Complainant to successfully schedule anything concerning work outside of work time after work. I, Complainant's representative, did try on many occasions to schedule official time in order for Complainant and I to consult but it was difficult as our schedules conflicted due to Complainant's situation. Also, I had prior arrangements as well that made it difficult to meet with Complainant whenever he was able due to my hectic schedule at the time. Also, due to a new bid shift beginning, summer travel and staffing shortages, it was difficult for me to receive official time because I had to oversee the operation. Then on May 5, 2019 Complainant's mother passed away and he became extremely busy with preparations for the funeral and settling her estate in the aftermath of everything as well as console his family and children. This was an extremely difficult time in Complainant's life and still is being that he is still in the grieving process.

On June 25, 2019, the AJ ordered the dismissal of Complainant's hearing request:

Complainant asserts that he had been busy caring for his children, serving as the primary caretaker for his mother, and then grieving his mother's death. Complainant further asserts that the foregoing activities and the busy schedule of his representative prevented him from meeting with his representative. The foregoing explanation does not constitute good cause for Complainant's failure to timely submit a pre-hearing statement. Health issues, family issues and other personal issues do not inherently constitute good cause for failing to meet a filing deadline, even when such issues are serious in nature. Rather, to establish good cause for missing a filing deadline, one must show that he was both physically unable to meet the filing deadline and physically unable to request an extension of time in advance of the filing deadline. Here, Complainant has not shown that he has satisfied either of the foregoing requirements for establishing good cause. Moreover, an inability to communicate with one's representative does not constitute good cause for failing to meet a filing deadline. Accordingly, Complainant has not established good cause for his failure to timely submit a pre-hearing statement.

The AJ remanded the matter to the Agency for a final agency decision. The Agency subsequently issued a final decision finding that Complainant was not subjected to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates his explanation for failing to comply with the AJ's Orders and requests that his case be returned for a hearing.

ANALYSIS AND FINDINGS

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.

In applying the first factor, we find that Complainant's non-compliance consisted of his failure to submit his pre-hearing statement by May 22, 2019, in accordance with the AJ's Order dated February 5, 2019.

In applying the second and third factors, we find that the prejudicial effects as well as the consequences in terms of delayed justice resulting from Complainant's noncompliance were minimal in that the situation could have been quickly remedied by the imposition of a new deadline to submit a pre-hearing statement. In applying the fourth factor, we find that there were no other incidents of non-compliance with the AJ's Orders that could be attributed to Complainant.

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 contumacious 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.

In dismissing Complainant's hearing request, the AJ stated that serious health issues do not inherently constitute good cause for failing to meet a filing deadline unless Complainant demonstrates that he is physically unable to either meet that deadline or request an extension of time in advance. However, in two recently issued decisions in which the complainant raised illness as a defense to non-compliance, the Commission still required a showing of either contumacious conduct or failure to exercise due diligence on the part of the complainant in order to justify imposing the harshest sanction available. See Cher C. v. Dep't of the Navy, EEOC Appeal No. 2019002081 (Sept. 21, 2020) (complainant's assertion that she was ill during early phase of discovery undercut by her failure to provide an affidavit to the investigator after multiple requests, willful and repeated failure to participate in the hearing process, filing false pleadings, withholding evidence, and failing to request extensions of discovery based on her alleged illness). See also Kristie O. v. Dep't of the Air Force, EEOC Appeal No. 2019002756 (Sept. 23, 2020)

(complainant's assertion that her representative was ill and unable to respond to the AJ's order undercut by her failure to offer any proof that either she or her representative attempted to inform the AJ of their inability to timely comply with the order).

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 hearing request in the absence of a clear showing of contumacious conduct or failure to exercise due diligence 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).

In this case, Complainant did not claim that he himself or his representative was ill. Rather, he asserted that he had been overwhelmed by his mother's sudden decline in health and her passing on May 5, 2019, two weeks and three days prior to the deadline for filing his pre-hearing statement. Emotional traumas can be every bit as incapacitating as physical ones, especially when the passing of a loved one is involved. 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., Cleo S. and Cher C., but absent in Georgianne B. and Drucilla Y. Likewise, we do not find that Complainant willfully failed to act with due diligence as was the situation in Alice S., Robert A. and Kristie O. Rather, the worst that could be said about Complainant is that he was negligent in overlooking the May 22nd deadline for submitting his pre-hearing statement. This is entirely understandable given that his mother had passed away recently before. 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 February 5, 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 Atlanta, Georgia, within fifteen (15) calendar days of the date this decision becomes final.

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 (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

February 25, 2021

Date