



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Garrett B.,¹
Complainant,

v.

Andrew M. Saul,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2019002002
Hearing No. 550-2018-0052X
Agency No. SF-18-0223-SSA

DECISION

On February 19, 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 22, 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 the complaint to the Hearings Unit of the San Francisco District Office to be processed in accordance with 29 C.F.R. § 1614.109.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Claims Specialist, GS-0105-11, in the Agency's Workload Support Unit in Richmond, California. On March 22, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him based in reprisal for prior protected EEO activity when: (1) on December 7, 2017, the Assistant District Manager gave Complainant an oral warning that Complainant's emails were unprofessional, threatening, and contained inappropriate language; and (2) on November 28, 2017, Complainant was subjected to unlawful harassment, in terms of working conditions related to email and verbal communication from management.

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 the investigation, on August 3, 2018, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.² On November 29, 2018, the AJ assigned to this complaint dismissed Complainant's hearing request and remanded it to the Agency for a final decision as a sanction because Complainant allegedly failed to respond to a notice by the AJ of his intent to issue a summary judgment decision in favor of the Agency. The Agency subsequently issued a final decision finding that Complainant was not subjected to discrimination or reprisal as alleged.

DISMISSAL OF HEARING REQUEST

The record shows that on November 6, 2018, the AJ notified (NOTICE) the parties that it appeared from the undisputed facts that the Agency was entitled to judgment without a hearing (i.e., summary judgment). In the NOTICE, the AJ advised Complainant that if no response was received that he would proceed to issue a summary judgment decision in the Agency's favor or dismiss the hearing request and remand the matter to the Agency for issuance of a final agency decision, without further notice of the proposed action. Complainant was given 15 days to respond. On November 29, 2018, the AJ issued a Decision and Order: Final Agency Decision (ORDER) which dismissed the hearing request and remanded the matter to the Agency for issuance of a final decision. The AJ dismissed the hearing request because Complainant had allegedly failed to respond to the NOTICE.

Complainant asserts that he did in fact respond in a timely fashion. Specifically, Complainant states and the documentary evidence shows that he sent an email from his work email address to the AJ on November 20, 2018 at 4:53 p.m. that stated the following:

Dear [AJ],

Attached is a .pdf scanned copy of the original and signed November 20, 2018 response to the NOTICE/ORDER of November 6, 2018. I will put the original in the mail to you today.

Thank you,

Complainant copied his personal email³ and two email addresses for the Agency representative. The AJ responded to Complainant's email which stated in its entirety: "Thank You. Did you serve the Agency?"

² The Agency indicated in its final agency decision that it was being issued after Complainant failed to request a hearing within the regulatory timeframe. However, the record before us does not indicate that the Agency raised any arguments regarding service of the hearing request before the AJ or on appeal.

³ Complainant states that he did not have access to his work email account while he was off duty and, accordingly, used both his work and personal email account to correspond with the AJ.

Complainant responded to the AJ from his personal email address later that evening noting the specific address for the Agency's Office of General Counsel where he sent a hard copy of his response and stating that he "hope[d] that [was] sufficient."

On December 1, 2018, following receipt of the ORDER, Complainant sent the AJ an email seeking reconsideration, outlining the email exchanges above. The AJ responded to Complainant's email seeking reconsideration and stated:

I responded to your email message which I did receive. However, the "pdf" item referenced by you was not attached and no response to the Notice and Order was received by mail as you suggested. Thank you.

On December 1, 2018, Complainant responded to the AJ's email with several emails. Complainant asked the AJ why he did not notify him that he did not receive the pdf file. He also attached the original email with the pdf attachment in this email and noted that when he initially emailed the AJ with the pdf file, he sent it from his personal email account and confirmed that the pdf file was attached. Additionally, he noted that the original email that he was forwarding to the AJ did indeed have the pdf file attached. Complainant further noted that he copied the Agency and his union representative in the original email. Complainant surmised that the AJ must have overlooked the attachment because it came from his personal email and asked him again to reconsider his decision. On December 3, 2018, Complainant was back in the office and resent the entire chain of emails seeking reconsideration, including the original email with the attachment from his work email address and again summarized what happened and his theory that his response to the ORDER was overlooked because it came from his personal email address. The AJ responded to Complainant's December 3, 2018 email asserting that he did indeed receive his initial response but noted that the pdf file referenced by Complainant was not attached and no response to the NOTICE was received by mail as Complainant indicated.

An AJ has the authority to sanction either party for failure without good cause shown to fully comply with an order. 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).

In this case, we find that the sanction imposed by the AJ was too harsh and a lesser sanction would serve the purpose of deterring similar conduct in the future. The AJ should have tailored the sanction to what was lost by the delay in receiving Complainant’s response to the NOTICE, rather than a dismissal of the hearing request in its entirety. We note that there is documentary evidence supporting the Complainant’s assertion that the pdf file was attached to his email prior to issuance of the AJ’s ORDER. However, we find that even if there was an error, the AJ could have alerted Complainant to the missing attachment which appears to have been an inadvertent mistake rather than an intentional failure to follow an order by the AJ.⁴ In addition, we note that the record is devoid of an Agency response to the NOTICE, despite the express requirement in the NOTICE that it submit a response.⁵ Rather than issuing a summary judgment decision on the merits without consideration of Complainant’s response, the AJ imposed the harsher sanction of dismissing the complaint from the hearing process in its entirety. The Commission finds a lesser sanction would have sufficed to prevent Complainant or his representative from failing to adhere to the AJ’s orders in the future.

CONCLUSION

Accordingly, this Commission VACATES the Agency’s final decision and REMANDS this matter back to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency shall submit to the Hearings Unit of the EEOC San Francisco District Office a request for a hearing within 15 calendar days from 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 from 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 issue a decision 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.

⁴ Although, there is no information as to why the hard copy was not received by the AJ.

⁵ The AJ states in his NOTICE: “This is a written Order for the parties to address the undisputed material facts and to provide any other information relevant to this matter. The Agency will respond.”

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

June 16, 2021

Date