



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

[REDACTED]
Edward W.,¹
Complainant,

v.

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

Appeal No. 2019005957

Hearing No. 420-2019-00129X

Agency No. ATL180174SSA

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a) 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 Social Insurance Specialist, GS-0105-12 at the Agency's Field Office in Starkville, Mississippi. On February 20, 2018, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the bases of race (African-American) and sex (male) when:

1. On October 26, 2017, S1 issued him a Performance Assessment Communication System (PACS) annual rating of "Successful Contribution;" and

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.

2. On November 14, 2017, during a discussion of his FY 2017 PACS rating, his second-level supervisor (S2) demoted him from his Operational Supervisor (OS) position to a Technical Expert (TE) position.

Complainant identified the Second-Level District Manager, his immediate supervisor (S1), the First-Level District Manager, his second-line supervisor (S2), and the Area Director, his third-line supervisor (S3) as the responsible management officials.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing and the AJ assigned to the case issued an order of acknowledgment and scheduled the initial conference on January 31, 2019. The order laid out the procedures to be followed with respect to the conduct of the hearing. Section VIII of the order warned the parties that failure to follow any of the AJ's orders could result in sanctions, including dismissal of the hearing request.

The conference was initially scheduled to be held on February 26, 2019 but rescheduled for March 20, 2019. Complainant failed to appear on March 20th, and on that date, the AJ issued a consolidated order directing Complainant to show cause and to appear for a telephone conference to be rescheduled on Wednesday, April 3, 2019. The order stated, in pertinent part:

At the telephone conference, Complainant shall be prepared to show cause why he should not be sanctioned for failing to appear for the March 20, 2019 telephone conference, including failing to notify the Administrative Judge if he could not appear. In the absence of a showing of good cause, Complainant will be subject to sanctions including, but not limited to *** remand of this complaint to the Agency for final action.

On April 3, 2019, the AJ issued a post initial scheduling conference order. The order noted that Complainant and his representative were both present but did not mention whether or not Complainant showed good cause for failing to appear at the March 20th conference. The AJ explained the time frames to be adhered to during the subsequent phases of the proceeding, including:

- Discovery – May 3 – August 3, 2019;
- Deadline for dispositive motions – 30 days from close of discovery or by September 3, 2019;
- Discovery motions – within 10 days after receipt of deficient response or after discovery due, whichever comes first;

In paragraph (4) of the section of the order designated as “Additional Orders and Notices,” the AJ stated:

Parties are noticed that failure to comply with orders of the Administrative Judge, including deadlines, may result in sanctions including, but not limited to, adverse inferences, findings of fact in favor of the other party, exclusion of witnesses and evidence, dismissal of the complaint, remand of the complaint for a Final Agency Decision, and default judgment.

On June 24, 2019, the Agency filed a motion to compel discovery and to stay all deadlines. In its motion, the Agency reported that it served its discovery requests on Complainant on May 14, 2019, making his responses due by June 13, 2019, but that no responses had been received from Complainant by that date. The Agency further reported that on June 14, 2019, its counsel emailed Complainant informing him that his responses were past due and inquiring when the responses would be produced, and that Complainant had neither responded to the Agency's email nor produced responses to the Agency's discovery requests. The Agency requested that the AJ order Complainant to fully respond to the Agency's initial discovery requests, and that if Complainant failed to do so, that the AJ either draw an adverse inference or dismiss the hearing request. Finally, the Agency moved for a stay in all outstanding deadlines until the discovery dispute was resolved, pointing out that it could not further prosecute the case without full completion of discovery.

On July 10, 2019, the AJ granted the Agency's motion to compel and directed Complainant to provide complete responses to the Agency's discovery requests within five days of the issuance of the order. The order also stated that failure to comply could result in sanctions, up to and including dismissal of the hearing request. In response to the Agency's request to extend the deadlines, the AJ granted a 30-day extension to the discovery period.

On July 25, 2019, the Agency filed a motion for sanctions against Complainant for failing to fully respond to the Agency's discovery requests and failing to comply with the AJ's orders. Specifically, the Agency requested the AJ dismiss the hearing request or in the alternative, to impose other appropriate sanctions. The Agency reported that on July 10, 2019, Complainant sent the Agency a fax containing partial responses to the Agency's discovery requests. The motion stated, in pertinent part:

On July 23, 2019, the [Agency] informed Complainant that his responses were deficient in that he had failed to respond to the Agency's requests for production of documents beyond sending a copy that appeared to be his own affidavit from another EEO complaint investigation and did not identify to which request the document purportedly responded. Additionally, Complainant did not respond to one of the Agency's requests for admission. Furthermore, Complainant responded to one of the interrogatories, which asked him to provide evidence supporting a contention that "opportunities and guidance provided to white employees was not provided to black males because [his Second-Line Supervisor] 'had a problem with males in general especially black males in management.'" [Complainant's] response directing the agency to "[r]eview the history of the Columbus MS District" is non-responsive. The [Agency] gave

Complainant until July 25, 2019 (10 days after his responses were due under the [July 10, 2019] Order granting the motion to compel) to comply and advised that the agency would file a motion for sanctions. As of the time of this filing, the [Agency] has not received the supplemental responses. *** Here, dismissal of Complainant's hearing request is appropriate. The Commission has repeatedly held that failure to respond to discovery requests in the face of an order requiring such responses is sufficient grounds for dismissal of a hearing request. [Citations omitted.] Additionally, Complainant had adequate and explicit warning that dismissal of his hearing request could be the consequence for his failure to comply with the Order granting the Agency's motion to compel.

The next day, July 26, 2019, the AJ issued an order dismissing Complainant's hearing request:

On July 25, 2019, the Agency filed a motion for sanctions for Complainant's failure to follow her July 10, 2019 order compelling him to respond to the Agency's discovery requests. For the reasons stated in the Agency's motion for sanctions, I find that sanctions are appropriate and that a dismissal of Complainant's hearing request is the appropriate sanction.

CONTENTIONS ON APPEAL

On appeal, Complainant raised the following contentions:

I believe my case was wrongfully dismissed and that Agency Counsel and the AJ had no intentions to hear and review my case. The AJ stated in our first conference call that she did not believe the agency discriminated against me but place me in a position suitable. This statement is evidence the AJ had already predetermined her final decision. I faxed a copy of my agency discovery request to Agency Counsel on July 9, 2019. I do not understand why he waited until July 23, 2019 to request additional information and stated that if information was not received by July 25, 2019, he would file a motion for sanctions for non-compliance with the AJ.

The Agency argues that the AJ properly exercised her authority by dismissed the hearing request. The Agency contends that Complainant only partially responded to its discovery requests and failed to respond to its deficiency notice. As a result, the Agency argues that the AJ properly dismissed the hearing request because Complainant failed to abide by the AJ's order.

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, 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”).

Dismissal of Complainant’s 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, we find several instances of Complainant's alleged noncompliance with the AJ's orders. At the outset, we note that Complainant failed to appear at the initial pre-hearing conference scheduled for March 20, 2019, which prompted the AJ to reschedule the conference for April 3, 2019, and to order Complainant to show cause regarding his failure to appear. Complainant did appear at the April 3, 2019 conference, which apparently cured Complainant's purported initial noncompliance. Satisfied with Complainant's response to the April 3rd show cause order, the AJ set out the time frames for the hearing, including the discovery period. The second alleged noncompliance raised by the Agency was Complainant's failure to respond to its discovery requests by June 13, 2019 and subsequent failure to inform the Agency as to when those responses would be forthcoming. This prompted the AJ to grant the Agency's motion to compel discovery on July 10, 2019. The Agency acknowledged in its July 25, 2019 motion for sanctions that Complainant did submit a response to its discovery requests on July 10th, the same day the AJ issued her order granting the motion to compel. The Agency maintained that Complainant's noncompliance was in the adequacy of his responses to several of its discovery requests. On appeal, Complainant contends that the Agency waited until July 23, 2019 to inform him that his responses were not sufficient and only gave him two days to respond under the threat of sanctions.

Applying the second factor, we note at the outset that the discovery period was originally set from May 3, 2019, through August 3, 2019. Pursuant to the Agency's own motion to compel discovery, the AJ extended the discovery period by an additional 30 days to September 3, 2019. The AJ's decision to dismiss Complainant's hearing request on July 26, 2019 abruptly cut off the process well before the end of the discovery period. Complainant still had sufficient time to cure the alleged deficiencies in his responses to the Agency's discovery requests. But because the AJ granted the Agency's motion to dismiss the complaint without first ordering Complainant to show cause, and because the discovery requests and Complainant's responses thereto are absent from the record, we cannot conclude that the Agency suffered any prejudicial effects as a result of Complainant's allegedly inadequate discovery responses. In applying the third factor, we find that there was no delay in justice that could be attributed to Complainant's partial responses to the Agency's discovery requests. Again, we emphasize that the proceeding was still in the middle of the discovery phase when Complainant's responses were received by the Agency and deemed inadequate. Consequently, any problems concerning the adequacy of Complainant's response could have been cured well before the discovery period ended. In applying the fourth factor, we find no other instances of Complainant's alleged noncompliance with the AJ's orders.

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 contumacious conduct. 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 unjustifiably failed to respond to those orders in order to warrant dismissal of the hearing request as a sanction. In the absence of either circumstance, we cannot find that the integrity of the process had been so compromised as to warrant the most severe sanction. When a lesser sanction would normally suffice to deter the conduct and to equitably remedy the opposing party an AJ may be abusing her discretion by dismissing the hearing. 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). Moreover, it is well-settled that before a sanction can be imposed, the non-complying party must be put on notice that it could be sanctioned for its conduct and this is typically accomplished via an order to show cause. Chere S., supra. Show cause orders are unnecessary where a party has filed a motion for specific sanctions *and the non-moving party has had an opportunity to respond*. Id. (Emphasis added.)

With the foregoing considerations in mind, we find that Complainant's appeal statement reflects his belief that he had complied with the Agency's discovery requests when he faxed his responses to the Agency on July 9, 2019, the day before the Agency acknowledged receiving them. By dismissing Complainant's hearing request outright after only one day rather than issue an order to show cause, the AJ deprived Complainant of his opportunity to respond to the Agency's motion for sanctions and demonstrate that his responses to its discovery requests were adequate.

As we noted above, both the Agency's discovery requests and Complainant's responses thereto are missing from the record. Consequently, the Commission is unable to independently assess the adequacy of Complainant's responses to the Agency's discovery requests.

Ultimately, we find the record before us insufficient to demonstrate that Complainant had engaged in the kind of willful or obstinate refusal to comply with an AJ's orders that typifies contumacious conduct or that he willfully failed to act with due diligence. We therefore find that the AJ's dismissal of Complainant's hearing request was too harsh a sanction in that it prematurely curtailed the proceeding.

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 action 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 Birmingham, Alabama, 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 (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).

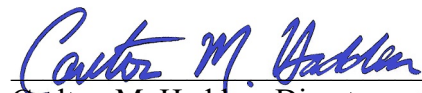
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

April 15, 2021
Date