



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

[REDACTED]  
Tynisha H.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020000367

Hearing No. 440-2019-00164X

Agency No. 4J-604-0155-18

**DECISION**

On October 4, 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 September 9, 2019, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission VACATES the Agency's final decision.

**ISSUE PRESENTED**

The issue presented is whether it was an abuse of discretion for an Administrative Judge (AJ) to dismiss Complainant's hearing request as a sanction.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Q7-02 Carrier Technician at the Agency's Addison, Illinois Post Office. On August 22, 2018, Complainant

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<sup>1</sup> 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.

contacted an EEO Counselor and filed a formal EEO complaint on December 17, 2018, alleging that the Agency discriminated against her on the basis of reprisal for prior protected EEO activity when:

1. On September 13, 2018, and November 17, 2018, management gave her a hard time about attending medical appointments;
2. On September 14, 2018, the Postmaster charged at her and pulled the earbud from her ear;
3. On September 17, 2018, she asked to leave sick, and the supervisor laughed at her;
4. On November 19, 2018, she was given an investigative interview, and on November 26, 2018, she received a Letter of Warning; and
5. Between November 12, 2018, and January 2019, management made her work beyond her medical restrictions.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC AJ. The AJ assigned to the case issued an Acknowledgment Order on June 20, 2019, and Complainant confirmed receipt of the Acknowledgment Order by email on June 22, 2019. In the Acknowledgment Order, the AJ scheduled an initial conference for July 16, 2019, and stated that, at the initial conference, the parties should be prepared to discuss various matters, including additional documents or evidence that the AJ ordered the parties to provide by July 11, 2019:

1. Complainant shall submit all evidence that the Responsible Managing Official(s) was aware of her prior EEO activity;
2. Complainant shall submit all evidence that Complainant's prior EEO Activity was a factor considered during the underlying events outlined in the accepted issues;
3. Complainant shall submit all evidence of any retaliatory motive that the Agency had during the underlying events as outlined in the accepted issues;
4. Complainant shall submit all evidence of any comparators to Complainant who reported to the same supervisors and were similarly situated who were treated more favorably than Complainant with respect to attendance and leave requirements and discipline;
5. Complainant shall identify all duties she performed outside her medical restrictions, the RMO who required her to perform outside her medical restrictions and all witnesses who saw her working outside her medical restrictions;
6. Complainant shall provide copies of all medical documentation provided to the Agency following any unscheduled leave during the relevant time period;
7. Complainant shall explain what harm she suffered as a result of any missed doctor's appointments;
8. The Agency shall submit any evidence, which is not already included in the ROI, which refutes Complainant's claims and allegations raised in Complaint 4J-604-0155-18.

Acknowledgment Order at 2. In the Acknowledgment Order, the AJ stated, "These documents are due to the Administrative [sic] no later than **July 11, 2019**, with copy to the opposing party.

**If Complainant fails to timely submit the requested evidence, the Initial Conference will be canceled and sanctions may be imposed up to, and including dismissal of the hearing request.” Id. (emphasis in original).**

On July 10, 2019, Complainant’s mother, who is not an attorney, (CM1) sent an email to the AJ, asking the AJ to review the attached documents “and advise if she needs to do anything else.” Hearing Correspondence File (HCF) at 2. The attached documents were a copy of the Acknowledgment Order and a Designation of Representative Form naming a non-attorney as representative (CR1) for Complainant. Id. at 5-11. On July 10, 2019, the AJ responded, “I cannot give legal advice, but this attachment does not include any of the information that Complainant was asked to provide.” Id. at 2. On July 11, 2019, CM1 emailed additional attachments to the AJ. Id. at 12-153.

At 8:07 a.m. on July 12, 2019, the AJ emailed the parties an Order to Show Cause. Id. at 156. In the Order to Show Cause, the AJ stated that Complainant had failed to provide the documentation requested in the Acknowledgment Order. Id. at 157. The AJ cancelled the Initial Status Conference and ordered Complainant to show cause by July 22, 2019 why sanctions should not be imposed for her failure to comply with the AJ’s order. Id. at 157-58.

At 9:25 a.m. on July 12, 2019, Complainant emailed the AJ, stating that she had sent the documents to the AJ in a timely manner and explaining that CM1 had emailed the attachments on her behalf because Complainant did not have a way to scan the documents. Id. at 159-60. At 5:09 p.m., the AJ responded to Complainant, stating that the documents provided by CM1 were in the ROI and were not responsive to the AJ’s request and adding, “The ROI does not contain the information I requested. As the Complainant you have the burden of proof.” Id. at 159. At 5:24 pm. on July 12, 2019, Complainant replied that CM1 “sent different attachments to you.” Id. At 5:34 p.m., the AJ sent the following reply to Complainant’s 5:24 p.m. email:

The information sent is not what you were ordered to provide. You were asked for specific documentation in the Ack Order. She [CM1] sent information from the ROI. You have not complied with the Ack Order [Complainant]. You designated [CR1] as your representative, not your mother. I did not have to accept anything from your mother, nor did I have any obligation to communicate with her, but I did. I told her you needed to comply with the Order and provide the requested documentation by July 11. You failed to do so. This is my last communication to you on this subject.

Id. at 159. Complainant sent additional emails to the AJ at 5:29 p.m. and 5:33 p.m., including a copy of the attachments previously provided by CM1 and stating that the attachments had contained more than 100 pages and were “everything I have” related to her EEO complaint. Id. at 162, 302. At 5:59 p.m., the AJ replied, “This documentation does not include the documentation you were asked to provide. Please read your Acknowledgment Order.” Id. at 303. At 6:42 p.m., Complainant responded, “I apologize I sent everything I had but I will send the documentation

that was requested. Thank you.” Id. At 9:29 p.m., the AJ replied, “It is too late. Now you have to show a legally sufficient reason for you failed to send it by July 11, 2019, as ordered.” Id.

On July 17, 2019, Complainant emailed the AJ, requesting more time to sent in the requested information, noting that she had not understood what kind of documents the AJ was asking for and adding, “I am seeking a legal representative to help me with this case.” Id. at 303.

On July 29, 2019, the AJ emailed the parties an Order of Dismissal of Hearing Request. Id. at 304. In the Order of Dismissal, the AJ stated that Complainant failed to provide the information requested in the Acknowledgment Order and that, in response to the Order to Show Cause, “Complainant emailed the Administrative Judge five times and included the previously provided and deficient information from the ROI. Complainant was advised that the Administrative Judge had reviewed the ROI prior to sending the June 20, 2019 Order, and that the information requested in the Order was not a part of the ROI.” Id. at 306-07. The AJ dismissed Complainant’s hearing request as a sanction, finding “that Complainant has engaged in behavior that shows a lack of cooperation, and a failure to comply with Administrative Judge’s Orders” by failing to provide the requested information and by failing to provide a legally sufficient reason to justify her failure to do so. Id. at 308.

The Agency issued a final decision on Complainant’s EEO complaint in accordance with the AJ’s Order of Dismissal of Hearing Request. The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed. Complainant did not submit a statement or brief in support of her appeal.

In response to Complainant’s appeal, the Agency requests that the Commission affirm its final decision finding no discrimination.

### ANALYSIS AND FINDINGS

The AJ dismissed Complainant’s hearing request as a sanction, stating that Complainant had failed to show good cause for not complying with her order. 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 information 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 Ward B. v. U.S. Postal Serv., EEOC Appeal No. 2019001570 (May 12, 2020); 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).

Dismissal of a hearing request by an AJ as a sanction is only appropriate in extreme circumstances, such as when the complainant engages in contumacious conduct, not merely negligence. See Schoenrogge v. Dep't of Justice, EEOC Appeal No. 0120130893 (May 20, 2013) (dismissal of hearing request appropriate where the complainant engaged in contumacious conduct that included repeated failure to comply with discovery obligations and serious abuse of process by filling voice mail boxes of AJ and Agency Counsel with erratic, lewd, and vulgar messages regarding his complaint to the point where intervention of the Federal Protective Service and local police was necessary); Robert A. v. U.S. Postal Serv., EEOC Appeal No. 0120182698 (Feb. 21, 2020) (dismissal of hearing request upheld where complainant failed to respond to order to show cause and did not provide evidence that he was incapacitated and unable to comply with the AJ's order).

Consequently, if a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, an AJ may be abusing his or her discretion by dismissing the 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 remained 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); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000) (dismissal of hearing request rejected on appeal where the complainant failed to return a designation of hearing form but informed the hearings office by phone that she was searching for an attorney and requested more time for discovery).

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 (Sep. 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. Chere S. v. Soc. Sec. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018); see also Royal,

EEOC Request No. 0520080052; Gray, EEOC Appeal No. 07A50030; Vovsest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005).

Here, the AJ determined that Complainant failed to establish good cause for failing to comply by providing the information requested in the Acknowledgment Order. However, we note that Complainant did timely provide the AJ with information in response to her request. However, while we agree with the AJ that many of the documents provided by Complainant and by CM1 were already in the ROI, we note that Complainant provided the AJ with medical documentation that does not appear in the ROI. See Hearing Correspondence File at 39-53. While the AJ may not have found the information provided by Complainant to be responsive, we do not find that Complainant engaged in contumacious conduct, and we find that it was an abuse of discretion to dismiss Complainant's hearing request as a sanction.

Moreover, it appears that the AJ ordered Complainant to provide information to rectify perceived deficiencies in the ROI prepared by the Agency. Although the AJ correctly noted that Complainant has the burden of proof regarding her discrimination claims, it is the Agency's responsibility to produce an adequate record. EEOC Regulation 29 C.F.R. § 1614.108(b) requires, inter alia, that the agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. One purpose of an investigation is to gather facts upon which a reasonable fact finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. Id.; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at Chap. 6, § IV.B (Aug 5, 2015). An investigation must include "a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant's group as compared with the treatment of similarly situated employees...and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant." Id. at § IV.C. Therefore, it was inappropriate to sanction Complainant under these circumstances when it is the Agency's responsibility to produce an adequate record.

Additionally, we note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have a "fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." EEO MD-110 at Chap. 7, § I; see also 29 C.F.R. § 1614.109(a) ("Upon appointment, the administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record."). If the AJ did not find the record adequately developed to determine whether discrimination occurred, it was inappropriate to order Complainant to provide the missing information before the Initial Conference and before any opportunity for discovery.<sup>2</sup>

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<sup>2</sup> According to the record, the EEO Investigator mailed affidavits to two witnesses, but the affidavits were not returned. Investigative Summary at 7. There is no documentation in the record of any Agency attempts to ensure participation in the investigation of these two witnesses, who appear to have been Agency employees. EEOC Regulations provide that the Agency and

Instead, the AJ could have ordered the Agency to conduct a supplemental investigation, or the AJ could have developed the record further during the hearing process. Accordingly, we vacate the Agency's final decision and remand the matter to the Hearings Unit. On remand, we advise the AJ to oversee the development of the record as needed during the hearing process.

### 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 in accordance with this decision and the Order below.

### ORDER

The Agency is directed to submit a copy of the complaint file to the Hearings Unit of the EEOC Chicago District Office 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 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.

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any employee of a federal agency shall produce such evidence as the investigator deems necessary. 29 C.F.R. § 1614.108(c)(1). The regulations further provide that, when the Agency or its employees "fail without good cause shown to respond fully and in timely fashion" to requests for documents, affidavits, the attendance of witnesses, or other evidence "the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal, may 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 it deems appropriate." 29 C.F.R. § 1614.108(c)(3).

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:



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Carlton M. Hadden, Director  
Office of Federal Operations

July 28, 2021

Date