



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

[REDACTED]  
Jayna A.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Federal Emergency Management Agency),  
Agency.

Appeal No. 2020002873

Hearing No. 520-2017-00363X

Agency No. HS-FEMA-21982-2012

**DECISION**

On February 26, 2020, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated January 27, 2020, concerning her complaint of unlawful 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, we VACATE the Agency's final decision and REMAND the matter to the Agency for further processing.

**ISSUE PRESENTED**

The primary issue presented concerns whether the dismissal of Complainant's hearing request was proper.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Data Processing Specialist/Disaster Assistance Employee in the Agency's Public Assistance Data Entry Department in Albany, New York.

On February 24, 2012, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination on the bases of race (African American), color (black), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964. The Agency accepted the following claims for investigation:

1. From December 12, 2011 through January 13, 2012, management spoke to Complainant in a belligerent manner, repeatedly calling her into meeting to discuss minor infractions "while Caucasian employees were not called into meetings";
2. From November 23, 2011 through February 11, 2012, management subjected Complainant to personal attacks and berated her when she raised a work-related question either verbally or in an email;
3. From November 23, 2011 through February 11, 2012, management, in an attempt to defame Complainant's work ethic, recorded her daily attendance and activity, while similarly situated Caucasian employees were not subjected to such scrutiny;
4. From November 23, 2011 through February 11, 2012, management subjected Complainant to segregated-seating arrangements;
5. From November 23, 2011 through February 11, 2012, management subjected Complainant to an unfair evaluation process, denied her training and advancement opportunities, and assigned her an unfair distribution of work assignments;
6. From November 23, 2011 through February 11, 2012, management inquired as to the nature of Complainant's work-related conversations with other employees; and
7. From November 23, 2011 through February 11, 2012, someone tampered and/or altered some of Complainant's work products in an attempt to sabotage her work performance.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

Though the AJ assigned to the matter originally scheduled the initial conference for January 29, 2019, the AJ subsequently rescheduled the initial conference to May 10, 2019, due to the government shutdown.

Following the initial conference, the parties commenced the discovery process. On July 16, 2019, the Agency filed a motion to extend discovery so that the parties could pursue settlement discussions. The AJ granted the Agency's motion on July 22, 2019 and extended the deadline to August 31, 2019.

On August 2, 2019, the Agency contacted Complainant's attorney to schedule the date of Complainant's deposition and inquired as to whether Complainant would be available for deposition on August 23, 2019. When Complainant's attorney failed to respond, the Agency unilaterally issued Complainant and her attorney a deposition notice on August 6, 2019, directing them to appear on August 23, 2019, at the Agency's headquarters in Washington, D.C. After Complainant's attorney again failed to respond, the Agency sent Complainant and her attorney an email on August 16, 2019, stating that Complainant needed to reach out to the Agency's point of contact for travel to arrange her trip to Washington, D.C.

On August 19, 2019, Complainant's attorney responded for the first time to the Agency's repeated requests to depose his client. In his email to the Agency, Complainant's attorney explained that he did not respond to the Agency's emails because he had been out of the office for most of the month and did not have a chance to respond. On August 21, 2019, Complainant's attorney clarified that he would "be on the road" for the next two weeks and would be available on either Friday, August 30, 2019, or Tuesday, September 3, 2019.

The following day, the Agency filed a motion to dismiss for failure to prosecute, wherein the Agency argued that dismissal of Complainant's hearing request was appropriate because Complainant had repeatedly taken a cavalier approach to deadlines. In this regard, the Agency maintained that Complainant was fully aware that discovery would close at the end of August, but she still wanted to reschedule her deposition until after the end of the discovery period without obtaining leave from the AJ. The Agency asserted that Complainant's unwillingness to adhere to discovery deadlines prejudiced both the Agency and the efficient processing of complaints, thereby warranting dismissal of her hearing request. Finding the Agency's motion to be unopposed, the AJ granted the Agency's motion on August 30, 2019, and remanded the matter to the Agency for the issuance of a final agency decision (final decision) on the merits of the complaint.<sup>2</sup>

In accordance with the AJ's order, the Agency issued a final decision on January 24, 2020, which concluded that Complainant failed to prove any of her allegations. The instant appeal followed.

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<sup>2</sup> After the AJ dismissed Complainant's hearing request, Complainant filed a motion for reconsideration with the AJ on September 3, 2019, seeking to reinstate her hearing request. To the extent that the AJ failed to consider Complainant's motion, we note that the Commission's established rules, regulations, and practices, do not specifically allow parties to file such motions as a matter of right. See Adkins v. Fed. Deposit Ins. Corp., EEOC Appeal No. 0720080052 (Jan. 13, 2012), citing Morillo v. Small Bus. Admin., EEOC Appeal No. 01A31140 (Jan. 22, 2004).

### CONTENTIONS ON APPEAL

Through her attorney, Complainant challenges the AJ's decision to dismiss her hearing request. In challenging the AJ's decision, Complainant vehemently argues that the AJ erred in granting the Agency's motion to dismiss without giving her an opportunity to respond. In this regard, Complainant asserts that under the Commission's rules, she had until September 6, 2019, to file an opposition to the Agency's August 22, 2019, motion to dismiss. Complainant further emphasizes that even if the AJ had viewed the Agency's filing as motion for sanctions related to a discovery dispute, she would still have had 10 days to respond, which would have made her response due on September 3, 2019. Yet, the AJ prematurely dismissed her hearing request on August 30, 2019.

In addition to the error identified above, Complainant also argues that the AJ erred by failing to issue a show cause order prior to granting the Agency's motion to dismiss. Here, Complainant asserts that the AJ's authority to sanction parties is limited to conduct involving a failure to comply with the AJ's orders or requests. Complainant maintains that given this limitation, the AJ should not have dismissed her hearing request without first issuing an order compelling her attendance at the deposition or issuing a show cause order. Complainant contends that "[a]t a minimum, this error requires the case to be remanded for issuance of that order and due consideration of Complainant's response."

Complainant further asserts that if she had the opportunity to respond, she would have argued that she did not fail to prosecute her case. Specifically, Complainant maintains that her attorney notified the Agency as early as July 10, 2019, that he would have limited availability in August, as he would be out of the office for most of the month. Complainant asserts that the Agency did not even attempt to discuss deposition dates until after close of business on Friday, August 2, 2019, when her attorney was "deep in hearing preparation and had no dates left in August where a deposition could be scheduled before August 30." While Complainant admits that her attorney did not respond to the Agency's August 6th email, Complainant asserts that her attorney subsequently responded to the Agency, and there was still ample time for the Agency to reschedule the deposition. Complainant emphasizes that the Agency did not make any attempt to identify another date or request an extension of discovery and simply filed a motion to dismiss. She contends that dismissal of her hearing request was improper given that dismissal of a complaint for failure to prosecute is only appropriate in cases where there is a clear record of delay or contumacious conduct, and no such no conduct was present here.<sup>3</sup>

The Agency opposes the appeal and maintains that the AJ's dismissal of Complainant's hearing request without issuing a show cause order was proper.

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<sup>3</sup> In addition to Complainant's procedural arguments, Complainant also requests that the Commission impose sanctions on the Agency for its failure to timely investigate her complaint. As we are remanding the complaint for further processing, we decline to address Complainant's request for sanctions at this time.

In so arguing, the Agency emphasizes that Complainant's repeated failures to participate in discovery and comply with deadlines preceded the August 2019 dispute over the date of the deposition. The Agency also cites to Council v. Dep't of Veterans Affairs, EEOC Appeal No. 0120080321 (Apr. 9, 2020) and Campbell v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112704 (Oct. 21, 2011), for the proposition that a show cause order is unnecessary where a complainant has already been put on notice via the initial acknowledgement letter that sanctions may be imposed for failure to comply with the AJ's orders.

### ANALYSIS AND FINDINGS

EEOC regulations confer upon its AJs "full responsibility for the adjudication of the complaint, including overseeing the development of the record." 29 C.F.R. § 1614.109. During the hearing stage, AJs also ensure the integrity and efficiency of the administrative process. In executing such responsibility, an AJ is authorized, among other things, to "regulate the conduct of hearings," "exclude any person who is disruptive," issue a decision without a hearing when there are no genuine issues of material fact in dispute, and "impose appropriate sanctions on parties who fail to comply with orders or requests." Equal Employment Opportunity Directive for 29 C.F.R Part 1614 (EEO MD-110) at Chap. 7, § III(D) (Aug. 5, 2015).

While EEOC Regulation 29 C.F.R. § 1614.109(f)(3) sets forth the specific types of sanctions an AJ may take when required by the appropriate circumstances, EEO MD-110 states that an AJ's ability to issue sanctions is limited to conduct by the parties involving a failure "to comply with the Administrative Judge's order or request." EEO MD-110 at Chap. 7, § III(A). Additionally, the EEO MD-110 generally requires that an AJ issue a show cause order before issuing sanctions. Id. See also, Miguelina S. v. Dep't of Justice, EEOC Request No. 2019002953 (Jan. 27, 2020).

Here, while the Agency filed a motion to dismiss due to Complainant's failure to attend the scheduled deposition and comply with deadlines, there is no indication that the AJ followed up on the Agency's motion by issuing a show cause order prior to issuing the August 30, 2019, decision dismissing Complainant's hearing request. We are mindful that the Agency has cited to Council v. Dep't of Veterans Affairs, EEOC Appeal No. 0120080321 (Apr. 9, 2010) for the proposition that a show cause order is unnecessary where a complainant has already been put on notice; however, we find that case to be distinguishable from the instant case.

Our review of Council, *supra*, shows that the AJ in that case issued an initial acknowledgement letter, advising the parties that failure to follow her orders may result in sanctions. When both parties failed to submit the required pre-hearing statements by the deadline, the AJ notified the parties of their failure, and extended the deadline for filing the pre-hearing statements. When complainant again failed to respond, the AJ in Council, dismissed complainant's hearing request. The Commission upheld the AJ's imposition of sanctions because complainant repeatedly failed to comply with the AJ's orders despite being advised on two occasions that failure to do so would result in sanctions.

In the instant case, however, we note that the AJ never ordered Complainant and her attorney to attend the Agency's scheduled deposition nor did the Agency file a motion to compel when Complainant failed to do so. Rather, the Agency asked the AJ to dismiss the complaint solely for violating the Agency's orders. Given these differences, we do not find Council, supra, to be instructive.

We also note that the Agency has also cited to Campbell v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112704 (Oct. 21, 2011), where the Commission upheld the AJ's dismissal of complainant's hearing request for failure to respond to the agency's discovery requests and motions to compel and dismiss; however, we decline to follow it, as it clear that the Agency in this case never filed a motion seeking to compel Complainant's attendance.<sup>4</sup>

Therefore, we find that the AJ improperly cancelled the hearing without providing Complainant with an Order to Show Cause. Further, the AJ dismissed the hearing request without allowing Complainant the opportunity to respond to the Agency's motion. Therefore, we find that the dismissal of the hearing request was not appropriate.<sup>5</sup>

### CONCLUSION

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

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<sup>4</sup> In affirming the dismissal of complainant's hearing request, the Commission relied on Council, supra.

<sup>5</sup> Even assuming arguendo that Complainant did in fact violate the AJ's orders, we note that the Commission has repeatedly held 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). Here, the record reflects that Complainant's attorney informed the Agency as early as July 10, 2019, that he would have limited availability in August. It is also undisputed that Complainant's attorney notified the Agency on August 19, 2019, that Complainant would be available to be deposed on Friday, August 30, 2019, prior to the expiration of the discovery period. To the extent that the Agency was unavailable to depose Complainant on August 30, 2019, the Agency should have filed a motion to compel to require Complainant's attendance on August 23, 2019, as originally proposed or negotiated with opposing counsel to request an extension to the discovery period; however, the Agency failed to do so. Given these factors, we find the AJ's dismissal of the hearing request to be too harsh and unwarranted.

### ORDER

Within 15 calendar days of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC's New York District Office a renewed request for a hearing on this complaint, the complaint file, and a copy of this appellate decision. 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.

### 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

July 27, 2021  
Date