



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

[REDACTED]
Melissa H.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 2021000696

Hearing No. 530-2015-00075X

Agency No. BOP-2014-0367

DECISION

Concurrent with its November 5, 2020, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's default judgment in favor of Complainant. The Agency also requests that the Commission affirm its rejection of the relief ordered.

ISSUE PRESENTED

Did the EEOC Administrative Judge (AJ) abuse her discretion when she sanctioned the Agency with a default judgment in favor of Complainant for failing to transmit the report of investigation to Complainant within 180 days, as well as failing to issue the notice of an untimely investigation required by 29 C.F.R. § 1614.108(g)?

BACKGROUND

At the time this matter arose, Complainant was an applicant for employment with the Agency.

On March 24, 2014, Complainant filed a formal EEO complaint alleging that she was subjected to unlawful discrimination based on sex when, in December 2013, she became aware that she was not selected for a GS-5 Correctional Officer position advertised under Agency Vacancy Announcement No. BOP-N-0007-001-2013. The record reflects that the position was at the United States Penitentiary in Hazelton, West Virginia.

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.

By letter dated July 28, 2014, the Agency forwarded the formal complaint to a contract investigation firm. On September 10, 2014, the contract investigation firm submitted the report of investigation to the Agency.

On October 23, 2014, Complainant filed a hearing request and a Motion for Default Judgment. On October 27, 2014, the Agency transmitted the Report of Investigation (ROI) to Complainant and the EEOC Hearings Unit. On October 23, 2015, the assigned AJ held an Initial Conference. At this conference, the AJ granted the Agency permission to file a response to Complainant's Motion for Default Judgment.

On October 29, 2015, the Agency filed its opposition to Complainant's motion. In its Opposition, the Agency acknowledged the 37-day delay and asserted that the Agency had a high number of EEO investigations being worked on during this time period. In addition, the Agency argued the delay was brief, and Complainant was not prejudiced by the delay.

On December 3, 2018, the AJ issued an Order granting Complainant's Motion for Default Judgment. The AJ found that the ROI was transmitted 37 days after the 180-day time period set forth in the Commission's regulations. The AJ found that the Agency also failed to issue Complainant a notice, as required by 29 C.F.R. § 1614.108(g), that it was unable to timely complete the investigation. The regulation indicates the notice must provide an estimated date for the completion of the investigation and inform a complainant of their right to request a hearing or file a civil action, in the event a complainant does not want to wait until the completion of the investigation.

In reaching her determination to issue default judgment against the Agency, the AJ reasoned as follows:

[t]he Agency failed to notify Complainant in a timely manner that the investigation would not be completed in 180 days nor did it give an estimate of when it would complete the investigation as required by [Commission regulations] so Complainant could make an informed decision on what to do next...Despite the Agency's arguments, I find that the Agency has failed to establish good cause for its failure to provide Complainant with a copy of the investigative file within 180 days from the filing of her complaint or issue a written notice to the Complainant informing that it was unable to complete its investigation within the time limits required [by the Commission's regulations].

AJ Decision at 3-4.

The AJ cited Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009), in support of her decision to issue default judgment in favor of Complainant. The AJ ruled:

In the present case, despite Agency's contention that issuance of the ROI was delayed in an effort to thoroughly investigate Complainant's charge, the record shows that the Agency did not assign an investigator to Complainant's claim until July 28, 2014, yet the Agency did not issue the ROI to Complainant until October 27, 2014, which was four months (126 days) after Complainant filed her charge. Moreover, that record shows that the contractor issued the Agency the ROI on September 10, 2014, yet the Agency did not issue the ROI to Complainant until October 27, 2014. As articulated in Royal, I find that the Agency in this case failed to commence an EEO investigation that could reasonably be completed within the 180-day period following the filing of the formal complaint...

AJ Decision at 5.

Finally, the AJ found that Complainant established a prima facie case of sex discrimination and, as such, was entitled to personal relief, including damages.

A hearing on damages was held on July 20, 2020. On September 30, 2020, the AJ issued a decision on damages and attorney's fees. The AJ ordered training for all human resources professionals who participate in the hiring process at the facility at issue, the posting of a notice at the facility regarding the finding, an award of back pay,² \$30,000 in non-pecuniary compensatory damages, and \$41,005.70 in attorney's fees. The record reflects that the Agency filed two motions for the AJ to reconsider her decision issuing default judgment, which the AJ denied.

On November 5, 2020, the Agency issued a final order rejecting the AJ's default judgment sanction and filed an appeal with the Commission.³ In its final order, the Agency asserted that

² The record reflects that Complainant was subsequently hired at the facility in the position of Correctional Officer in January 2018. AJ Damages Decision at 5.

³ On October 30, 2020, subsequent to the AJ issuing her decision and prior to the Agency issuing its final order, Agency's Counsel (who represented the Agency during the proceedings before the EEOC AJ) submitted a brief to the Agency's Complaint Adjudication Office (CAO) (the Agency entity that would issue the final order in the instant matter) in Opposition to the AJ's Default Judgment, Damages, Attorney's Fees, and Costs. Therein, Agency Counsel, in a lengthy legal analysis, requested that CAO reject the AJ's default judgment. In response, Complainant's attorney sent an email to the Agency on October 30, 2020, that the AJ had already issued a decision in this matter and that the Agency should not consider new evidence in reaching its final action. We concur with Complainant's counsel and do not consider Agency's Counsel October 30, 2020 memorandum to CAO in reaching our determination herein. We further remind the Agency of its obligation to maintain a firewall between its EEO function and the Agency's defensive function. See Management Directive 110 for 29 C.F.R. Part 1614, Ch.1, (IV)(D) (rev. Aug. 5, 2015).

the AJ's sanction of default judgment was too harsh a sanction for a 37-day delay in transmitting the ROI to Complainant. Specifically, the Agency stated, "the AJ imposed the harshest sanction available against [the Agency], without finding that [it] failed to comply with an AJ order or instruction, and without any explanation of how the sanction imposed was the least severe but still effective sanction, given the 37-day delay in transmitting the record to Complainant." Final Order at 8. The Agency determined that the instant matter was more similar to Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (March 1, 2007), in which the Commission found that an AJ abused her discretion when she imposed default judgment as a sanction for an agency's delay in completing an investigation that was less than three months later than the 180-day deadline. Id. at 8-9. The Agency also contested the AJ's determination that Complainant established a prima facie case of sex discrimination. Id. at 10.

Complainant filed a statement in opposition to the Agency's appeal. Complainant, through her attorney, requests that we affirm the AJ's decision issuing a default judgment against the Agency. Complainant asserts that the Agency's dismissive attitude toward the delay in transmitting the ROI is an "insult" to the integrity of the EEO process and that a default judgment is the proper sanction against the Agency. Complainant also asserts that the AJ properly found that she established a prima facie case of sex discrimination.

ANALYSIS AND FINDINGS

Violation of Commission's Regulations

EEOC Regulation 29 C.F.R. § 1614.108(f) provides, in pertinent part, that agencies must provide a complainant with a copy of the investigative file within 180 days from the filing of the formal complaint and shall notify complainant of their right to request a hearing and decision from an AJ or a final agency decision within thirty days of their receipt of the investigative file. The record is devoid of evidence that Complainant agreed to an extension of this time period. Thus, the Agency should have transmitted the investigative file to Complainant no later than September 22, 2014.⁴ The Agency acknowledges that it did not transmit the ROI to Complainant until October 27, 2014, 37 days late. Agency's Final Order at 2.

EEOC Regulation 29 C.F.R. § 1614.108(g) provides that if the Agency does not provide the investigative file and notice of a complainant's right to request a hearing or a final decision within the 180-day time period, the Agency shall within this time period issue a written notice to a complainant informing them that it has been unable to complete its investigation within the time period, provide an estimated date of completion for the investigation and provide a complainant their right to request a hearing or a civil action, if they do not wish to wait until the investigation is completed. The Agency acknowledges that it did not issue Complainant such a notice. Agency's Final Order at 8. Based on the foregoing, we find that the Agency violated Commission regulations.

⁴ The end of the time period falls on Saturday, September 20, 2014. Thus, the time period is extended until the next business day, Monday, September 22, 2014. 29 C.F.R. § 1614.604(d).

Imposition of a Sanction

As an initial matter, we note that the AJ did not issue a Show Cause Order in this matter. See Miguelina S. v. Department of Justice, EEOC Request No. 2019002953 (January 27, 2020). However, as set forth above, the record reflects that the parties discussed Complainant's Motion for Default Judgment at the Initial Conference with the AJ and the AJ provided the Agency an opportunity to respond. The AJ's decision was issued after having received the Agency's Opposition. Furthermore, the Agency, in its submissions to the AJ, while asserting that a default judgment was too harsh a sanction in this matter, acknowledged that some type of sanction was warranted. See Agency's Motion for Reconsideration of the AJ's Order of Default Judgment (March 12, 2019) at 11-12. Based on these specific circumstances, we find that the Agency had notice of the specific sanctions that might be imposed and an opportunity to respond.

We now turn to the issue of whether default judgment was the appropriate sanction in this matter. The Commission has held that sanctions, while corrective, also act to prevent similar misconduct in the future and 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. 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 has emphasized that the purpose of the sanction is to deter the underlying conduct of the non-complying party. See Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005).

The factors pertinent to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted include: 1) the extent and nature of the non-compliance, including 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. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (March 1, 2007); Voysest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005).

In this matter, the AJ found that a default judgment in Complainant's favor would be the appropriate sanction for the Agency's conduct in this case. We again note, however, that sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. Applying this principle, we conclude that a more narrowly tailored sanction rather than a decision fully in favor of Complainant would be more appropriate here. We acknowledge that the Agency was responsible for a 37-day delay in transmitting the ROI to Complainant and failed to provide the notice set forth in 29 C.F.R. § 1614.108(g). However, it appears that even without the 29 C.F.R. § 1614.108(g) notice, Complainant requested a hearing on October 23, 2014. The Agency immediately provided Complainant with the report of investigation upon receiving notice of her hearing request and we find no evidence that the Agency's delay directly harmed Complainant.

Thus, we concur with the Agency that the instant matter is more analogous to Gray than to Royal. In Royal, in which the Commission found that that default judgment in favor of Complainant was warranted, the Agency did not even start the investigation until after the 180-day regulatory time limit had expired. In Gray, similar to the instant matter, the Agency initiated the investigation prior to the completion of the 180-day time period. In addition, Gray involved a delay of less than three months beyond the regulatory time frame, almost triple the 37 days in the instant matter.

Nevertheless, we find that the Agency's delay and its failure to comply with Commission regulations must not be overlooked. As such, we conclude that an evidentiary sanction, rather than default judgment, of not allowing the Agency to use affidavits or exhibits contained in the ROI to support either a motion to dismiss or a motion for summary judgment to be a more appropriately tailored sanction in this matter. See Gray, *supra*. Moreover, during the hearing, the Agency may not rely on affidavits contained in the ROI in lieu of witnesses who are unavailable to testify at the hearing. Such a sanction should effectively emphasize to the Agency the need to comply with Commission regulations pertaining to the investigation of complaints.

Therefore, after a careful review of the record, we modify the Agency's final order to affirm its rejection of the AJ's decision to issue a default judgment in favor of Complainant. As this will leave no decision rendered on the merits of the complaint, we REMAND this matter back to the hearing stage and modify the sanction imposed against the Agency as set forth in this decision and ORDER below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, the Agency shall, on behalf of Complainant, file a renewed request for a hearing, as well as submit the complete complaint file and a copy of this decision, with the EEOC's Philadelphia District Office Hearings Unit. Thereafter, an assigned 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. During the remanded hearing process, as a sanction for its failure to follow Commission regulations, the Agency shall not be permitted to use the affidavits and exhibits contained in the ROI to support either a motion to dismiss or a motion for summary judgment. Moreover, the Agency may not rely upon affidavits contained in the ROI in lieu of witnesses who are unavailable to testify at the hearing.

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

November 10, 2021

Date