



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Tessa L.,¹
Complainant,

v.

Martin J. Walsh,
Secretary,
Department of Labor,
Agency.

Appeal No. 2020003668

Hearing No. 440-2020-00034X

Agency No. ORC-19-05-060

DECISION

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 May 8, 2020 final decision concerning an equal employment opportunity (EEO) complaint claiming 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Contract Specialist in Chicago, Illinois.

On March 4, 2019, Complainant filed a formal EEO complaint, claiming that the Agency discriminated against her based-on race (African American), age, and in reprisal for prior protected EEO activity (opposing discriminatory practices).

By letter dated May 6, 2019, the Agency accepted the following claims for investigation:

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.

1. In April 2018, [Complainant] learned that [she was] not selected for the position of Supervisory Contract Specialist advertised under vacancy announcement number MS-18-CHI-OASAM-0034;
2. After [she was] made aware of [her] non-selection to the vacancy announcement in claim (1), [she] performed the work required under the position and had to train the selectee for the position;
3. On September 12, 2018, [her] supervisor denied [her] request for the position;
4. On September 18, 2018, [she] received a letter of counseling from [her] supervisor;
5. On September 20, 2018, [her] supervisor demanded that the office work on a Saturday. However, [she was] the only employee who had to work;
6. On an unspecified date, [her] supervisor came into a breakroom while [she was] having lunch with co-workers and said “are you still dating the white guy? You guys know she’s dating a much younger guy than her? And he’s really good looking”;
7. On October 12, 2018, [Complainant] was aggrieved when [she] received a “minimally satisfactory” on [her] Fiscal Year 2018 Performance Appraisal; and
8. On October 12, 2018, [her] supervisor rejected work that [she] performed in order to delay [her] release date from the Agency to begin her new job.

The Agency accepted claims (1)-(8) as part of Complainant’s hostile work environment claim. The Agency also accepted claims (2)-(5) and (7)-(8) as independent disparate treatment claims. The Agency dismissed claim (1) as an independent disparate treatment claim for untimely EEO Counselor contact. The Agency also dismissed claim (8) as an independent disparate treatment claim for failure to state a claim.

After an 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 requested a hearing.

On January 13, 2020, the AJ issued an Acknowledgment Order. Therein, the AJ set forth that the parties were to submit a Preliminary Case Information (PCI) report within 15 days from the date of the Acknowledgment Order. The AJ further stated that “[f]ailure to submit the PCI may result in sanctions, such as waiver of discovery; denial of motions in the areas addressed in the PCI...dismissal of the hearing request for final action by the Agency, or default judgment against the Agency.”

On January 27, 2020, Complainant's attorney filed a request to extend the time to file Complainant's PCI until February 4, 2020, which was granted.²

On January 30, 2020, the AJ issued an Order Scheduling Initial Conference. Therein, the AJ set an Initial Conference for March 10, 2020. The AJ also stated that Complainant's PCI report was due no later than February 4, 2020, and that failure to do so would result in cancellation of the Initial Conference and an issuance of a Show Cause Order.

On February 18, 2020, the Agency filed a Motion to Dismiss Complainant's Hearing Request. Therein, the Agency stated that Complainant, who is represented by counsel, failed to timely file her PCI report on February 4, 2020 and that the AJ should dismiss Complainant's hearing request.

Also, on February 18, 2020, the AJ issued an Order to Show Cause ordering Complainant to explain why sanctions should not be imposed for failure to submit the PCI report by February 4, 2020. The AJ ordered Complainant to respond to the Order to Show Cause by March 2, 2020.

On March 1, 2020, Complainant timely responded to the AJ's Order to Show Cause. Therein, Complainant's attorney asserts that this matter is not a case of willful disregard of a Commission order. Complainant's attorney further asserts that on February 3, 2020, he logged onto the EEOC Portal and tried to complete the PCI electronically. He was unable to do so. However, he asserts that he printed the PCI form, completed it by hand, and submitted a scanned copy that same day (February 3, 2020). Counsel said he did not realize until February 18, 2020, when he received the Agency's Motion and the AJ's Show Cause Order that the PCI form did not successfully upload to the portal. Complainant's counsel asserts that these circumstances do not constitute an effort by him to impede the efficient processing of the case.

On March 3, 2020, the AJ issued an Order of Dismissal of Hearing Request. Therein, the AJ found that Complainant failed to timely submit her PCI report by February 4, 2020. In addition, the AJ found that Complainant failed to respond to the Order to Show Cause. The AJ found that the proper sanction was dismissing the hearing request and remanding the matter to the Agency for a final decision.

On March 4, 2020, the AJ issued a Revised Order of Dismissal of Hearing Request. Therein, the AJ acknowledged that Complainant timely responded to the Order to Show Cause on March 1, 2020. The AJ again found the proper sanction was cancelling the hearing request and remanding the matter to the Agency for a final decision. The AJ reasoned that the Agency did not have a record of Complainant scanning or uploading anything in the EEOC portal until March 1, 2020, when he filed the response to the Order to Show Cause. The AJ asserts that Complainant's counsel did not contact her to inform her that he was having difficulty accessing the portal.

² While the record does not contain Complainant's counsel's extension request to submit the PCI or the AJ granting such request, both Complainant's counsel and the AJ acknowledge these events.

The AJ further asserts that Complainant's counsel did not contact her or Agency counsel after the Agency filed its Motion to Dismiss. Based on the foregoing, the AJ asserts that Complainant's counsel failed to provide a legally sufficient reason for the untimely filing of Complainant's PCI.

On May 8, 2020, the Agency issued a final decision finding no discrimination.

Complainant filed the instant appeal. Complainant's attorney asserts that he prepared the PCI form on February 3, 2020, scanned it, and believed he successfully uploaded it to the portal. He asserts that about two weeks later the Agency filed its Motion to Dismiss and the AJ issued a Show Cause Order. Complainant asserts that he timely submitted his response to the Show Cause Order via the portal on March 1, 2020. Complainant asserts that on March 3, 2020, the AJ issued an order dismissing the hearing request noting that Complainant failed to timely respond to the Order to Show Cause. Complainant states that he contacted the hearings clerk for the Commission's Chicago Office and explained the situation and that the hearings clerks could not find Complainant's response in the system. Complainant asserts that he logged onto the portal, while on the phone with the clerk, and saw that his response had been docketed when he filed it. Complainant's counsel asserts that the AJ subsequently issued a revised dismissal order on March 4, 2020, acknowledging that Complainant's response to the Order to Show Cause was timely.

Complainant's counsel further asserts that he has handled federal sector discrimination cases for 35 years and has never been sanctioned. He asserts at the time of the events the public portal was a relatively new system. Complainant's attorney states that he believed he had successfully uploaded the PCI report to the portal on February 3, 2020 and thus there was no need to contact the AJ to inform her that he was having difficulty with the portal. Complainant's attorney asserts that the first time he realized that the PCI report was not uploaded to the portal was on February 18, 2020 when he received the Agency's Motion. Complainant's counsel reasserts that there was no willful defiance of the AJ's orders. Complainant's attorney asserts that there were other sanctions available to the AJ that would have been more appropriate.

In response, the Agency asserts that the AJ's sanction was proper. The Agency asserts that Complainant in this matter is represented by counsel and more equipped to navigate the EEO process. The Agency asserts that upon learning of the problem on February 18, 2020, Complainant's counsel could have uploaded the PCI report and/or contacted the AJ and the Agency. The Agency asserts that OFO had previously held that the appropriate sanction for conduct that violated an AJ's order, even if not a willful or repeated violation, was to dismiss the hearing request and forward the case to the agency for a final decision.

ANALYSIS AND FINDINGS

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”).

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 AJs discretionary authority includes the power to impose sanctions upon a party that fails to comply with his/her orders. When a party fails without good cause shown to respond fully and in a timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, of 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 these 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 Appeal No. 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 Veteran 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 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.

Complainant's noncompliance with the AJ's orders consisted solely of her failure to timely submit the PCI report by February 4, 2020. Complainant's counsel's stated reason for the non-compliance was that he had believed that he successfully uploaded the PCI on February 3, 2020, prior to the deadline. The prejudicial effects of Complainant's non-compliance as well as any consequences resulting from the delay were minimal. Complainant's counsel on March 1, 2020 timely responded to the Show Cause Order and submitted a copy of the PCI report which he believed he had previously successfully uploaded to the portal.

The AJ found that the dismissal of the hearing request was the appropriate sanction. The AJ cites to decisions issued between 2004-2012. However, we have consistently held in more 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, not merely negligence. See Wilma B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020003672 (Dec.2, 2021). Cassey B. v. Dept' 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 Appeal No. 2019004843 (Mar. 10, 2020). Examples of contumacious conduct warranting dismissal of hearing requests include: Charlie K. v. Dep't of Veteran 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 proceedings, as well as failure to appear at pre-hearing conference; and Cleo S. v. U.S. Postal Serv., EEOC Appeal No. 012081406 (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 the 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).

These recent cases demonstrate that there must be a showing that Complainant either willfully disobeyed the AJ's orders or unjustifiably failed to respond to those orders to justify dismissal of the hearing request as a sanction. In the absence of either circumstance, we cannot find that the integrity of that process had been so compromised as to warrant this 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 his 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). See also e.g. Melinda S. v. U.S. Postal Serv., EEOC Appeal No. 2019005174 (June 16, 2021) (dismissal of hearing request overturned where the complainant demonstrated in response to a show-cause order that she had been suffering from an incapacitating medical condition notwithstanding that she had failed to provide details of that condition or request an extension of time); and Sylvester C. v. U.S. Postal Serv., EEOC Appeal No. 2019004212 (Feb. 2, 2021) (dismissal of hearing request overturned where there was no showing that the complainant received emails from the AJ notifying him about the prehearing conference).

With the foregoing considerations in mind, we determine that there does not appear to be any indications that Complainant or her attorney had engaged in the kind of willful or obstinate refusal to comply with the AJ's orders that typifies contumacious conduct. In addition, we do not find that either Complainant or her attorney willfully failed to act with due diligence with respect to the AJ's deadline to submit the PCI report. As set forth above, Complainant's counsel asserts that he attempted to complete the electronic PCI form on February 3, 2020. When this was unsuccessful, he asserts that he completed the form by hand, scanned it and believed he had timely and successfully uploaded it to the portal on February 3, 2020. Moreover, he timely responded to the Order to Show Cause and submitted a copy of the handwritten PCI report. As such, we conclude that the circumstances in this case did not justify the sanction imposed by the AJ.

After a careful review of the record, including Complainant's arguments on appeal, the Commission VACATES the Agency's final decision and REMANDS the matter to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER

The Agency is directed to submit a renewed hearings request on behalf of Complainant, as well as the complaint file and a copy of this decision, to the EEOC Hearings Unit of the Chicago District Office within fifteen (15) calendar days of the date this decision is issued. The Agency shall provide notification to the Commission's Office of Federal Operations as set forth below in the section entitled "Implementation of the Commission's Decision" that the complaint file and renewed hearings request has been transmitted to the Hearings Unit. Thereafter, the AJ shall process 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

January 24, 2022
Date