



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Otis P.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2020004334

Hearing No. 461-2020-00007X

Agency No. 2003-0629-2019102678

DECISION

On July 27, 2020, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

Complainant worked as a Psychology Technician, GS-0181-09, at the Southeast Louisiana Veterans Health Care System in New Orleans, Louisiana. On April 22, 2019, Complainant filed a formal complaint in which he alleged that the Agency² subjected him to discrimination and a

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

² The individuals Complainant identified as the responsible management officials include: the Local Reasonable Accommodation Coordinator (LRAC); the Human Resources Specialist who served as the Alternate Local Reasonable Accommodation Coordinator (ALRAC); the Program Manager who was his first-line supervisor (PM); the Chief of Psychology (CP); the Acting Chief of Psychology (ACP); and the Human Resources Chief (HRC).

hostile work environment on the bases of race (Asian), sex (male), disability (mental), age (40), and reprisal (prior protected EEO activity) in connection with the following incidents:

1. The LRAC and the CP denied Complainant a reasonable accommodation when:
 - a. Between February 20 and March 26, 2019, the LRAC failed to respond to Complainant's request to use email to discuss his accommodation request; and
 - b. On July 26, 2019, the CP denied Complainant's request for a reasonable accommodation and the alternate accommodation provided by the Agency addressed "irrelevant concerns," such as correcting his supervisor's work style and communication strategies.
2. The PM denied Complainant's request for formal training on the Structured Clinical Interview for DSM 5 Research Version (SCID-5-RV) while giving him a deadline of August 21, 2019 to complete his job duties regarding the SCID-5-RV;
3. The RAC, the ALRAC, the HRC, the PM, and the ACP discriminated against Complainant when:
 - a. On March 13, 2019, the ALRAC wrote Complainant requesting that he report to his office after Complainant provided his family doctor's letter of recommendation to management requesting to use written communication as a reasonable accommodation;
 - b. On April 17, 2019, the PM emailed Complainant requesting to discuss his new position description and job duties regardless of the HRC's statement "abolishment" of Complainant's current position cannot occur because he is currently occupying this position;
 - c. On April 17, 2019, the PM stated, "We reclassified the position that you currently hold to make it a Psychology Technician. This was done at your request last year," even though Complainant denied making such a request;
 - d. From April 29 to May 14, 2019, the LRAC repeatedly failed to respond to Complainant's questions regarding his reasonable accommodation request;
 - e. On May 16, 2019, the PM issued Complainant a "Letter of Expectation" with "orders" that he considered "inappropriate" even though she consulted with the local HR Officer after Complainant expressed his concerns regarding the Letter of Expectation;

- f. Between May 2 and June 4, 2019, the ACP has been unable to give Complainant feedback regarding her plan to speak to one of the Psychologists about Complainant's "concerns" as a "minority man in the breakroom; and
- g. Between May 31 and July 28, 2019, the HRC responded neither to Complainant's questions regarding his concerns of not receiving an interview score for a position for which he applied nor to Complainant's concerns regarding whether a position description changes every five years for every Agency employee.

During the ensuing investigation, the EEO Investigator made several attempts to obtain an affidavit or a declaration from Complainant. According to a file memorandum dated September 3, 2019, Complainant never submitted an affidavit to the Investigator despite being granted several extensions between August 23 and August 29, 2019. Investigative Report (IR) 84.

At the conclusion of the investigation, the Agency notified Complainant of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Shortly after Complainant requested a hearing, on November 18, 2019, the AJ assigned to the case issued an order of acknowledgment and initial teleconference scheduling the conference for December 17, 2019. In Section I of the order, the AJ directed Complainant to provide an initial conference report that would include any evidence in support of his claims that he did not provide to the Investigator. In Section IX, the AJ stated that failure to follow the acknowledgement order or any other order issued by the AJ could result in sanctions, including dismissal of Complainant's hearing request.

On December 17, 2019, shortly before the conference was to begin, Complainant's representative sent an email to the AJ and to Agency Counsel informing them that Complainant would not participate. Complainant cited as his reasons for nonparticipation an unspecified "active medical condition" and a "lack of trust" with the AJ based on the AJ's involvement in one of his prior EEO complaints. The AJ issued a post-conference order directing Complainant to explain in writing why he failed to provide the initial conference report or appear at the conference and to do so by January 16, 2020. In particular, the AJ ordered Complainant to answer all of the questions posed by the EEO Investigator on pages 91-120 and 136-37 of the IR. Alternatively, the order directed Complainant to submit a deposition to be conducted by Agency Counsel on February 5, 2020. The order repeated the warning about sanctions originally set forth in the November 2019 acknowledgment order, namely that Complainant's hearing request could be dismissed if he failed to comply with the AJ's orders.

On February 4, 2020, the day before he was scheduled to appear for his deposition, Complainant emailed the AJ asking her to approve his request to use written communication with Agency counsel. He cited an attached letter from his family doctor dated May 31, 2019 describing a reasonable accommodation in the form of written communications with management that the Agency had previously approved. IR 267.

The following day, the AJ denied Complainant's request, noting that the doctor's letter was sent before the instant proceedings began and that it applied only to management representatives and not staff attorneys charged with defending the Agency in litigation. Complainant nevertheless failed to appear for the deposition. In another email dated February 5, 2020, the AJ issued a final notice to show cause why a sanction should not be entered. The AJ stated that Complainant failed to comply with her post-conference order and failed to supplement the record either by answering the investigator's questions or submitting to the deposition with Agency Counsel.

An email exchange between Complainant and the AJ took place on February 11, 2020. At 10:05 a.m., Complainant sent the AJ an email asking for an extension on the grounds that he did not have a password and was unable to access the record in his case. At 11:16 a.m., the AJ responded that both she and Agency Counsel have sent all of the contents of the record to him by regular email or Microsoft Outlook, and consequently, that a password was unnecessary. At 12:11 p.m., Complainant responded back to the AJ that he was ill on February 5, 2020 due to Agency Counsel's failure to accommodate his request to communicate with her only in writing.

On February 13, 2020, the AJ issued an order dismissing Complainant's hearing request. The AJ cited as her reasons Complainant's multiple failures to comply with her orders and his failure to provide any good cause explanation for those failures. In particular, the AJ noted Complainant's failure to appear for the initial teleconference as required by the acknowledgement order, his failure to complete development of the record as required by the post-conference order, and his failure to appear for the mandated deposition.

Upon receipt of the AJ's dismissal order, the Agency issued a final decision in which it found that Complainant failed to establish the existence of a discriminatory or retaliatory motive attributable to any of the officials named in his complaint with respect to any of the incidents at issue therein. This appeal followed. In a brief dated August 25, 2020, Complainant contended on appeal that the AJ was "extremely culturally unfair," had "severely mishandled" one of his previous cases, and had disregarded his "medical restriction of written communication with all management representatives." Apparently in response to the AJ's denial of his request on February 5, 2020, Complainant argued that management representatives included the Agency's defense counsel."

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 AJ's Dismissal of Complainant's Hearing Request

As an initial matter, the Commission will address the AJ's sanction and whether dismissing Complainant's hearing request constituted an abuse of discretion. While a party charging an AJ with abuse of discretion faces a very high bar, the AJ's authority to impose a sanction upon a party for failure to comply with her orders is not unlimited. Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). To achieve a proper balance between deterring the noncomplying party from engaging in similar future conduct and equitably remedying the opposing party, it is necessary to apply the least severe sanction needed to respond to the noncomplying party's failure to show good cause for its noncompliance. Carolyn M. v. U.S. Postal Serv., EEOC Request No. 2019004843 (Mar. 10, 2020). Factors pertinent to such tailoring of sanctions include: (1) the extent and nature of the noncompliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. Linda D. v. U.S. Postal Serv., EEOC Appeal No. 2019004909 (Sept. 23, 2020), req. for reconsid. den'd EEOC Request No. 2021000803 (Feb. 10, 2021).

In applying the first and fourth factors, we find that Complainant's noncompliance was extensive, including failure to provide the EEO Investigator with his affidavit despite being granted several extensions, failure to appear at the prehearing teleconference, failure to comply with the AJ's order to supplement the investigative record, and failure to appear for a scheduled deposition undertaken for that purpose. Beyond his generalized assertions of being ill and being denied a reasonable accommodation from the AJ, Complainant has not presented any justification for his conduct. In applying the second and third factors, we agree with the AJ that Complainant's failure to provide an affidavit or submit to a deposition significantly slowed the processing of his complaint, which not only resulted in justice being delayed, but also had a prejudicial impact on the Agency in that its representative expended a lot of time and energy preparing its defense while Complainant essentially refused to prosecute his case.

In applying the fifth factor, we have consistently held that dismissal of a hearing request as a sanction is only appropriate in extreme circumstances, such as when the complainant engages in contumacious conduct, not merely negligence. Cassey B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004838 (Sept. 24, 2020); Cecile T. v. Dep't of the Treasury, EEOC Appeal No. 2019002373 (Sept. 22, 2020); Carolyn M. v. U.S. Postal Serv., EEOC Request No. 2019004843 (Mar. 10, 2020). Examples of contumacious conduct warranting dismissal of hearing requests include: Charlie K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019002293 (Sept. 22, 2020) (failure to provide investigative affidavit during agency investigation and failure to provide answers to interrogatories during discovery despite being granted multiple extensions in both phases of the proceeding, as well as failure to appear at pre-hearing conference); and Cleo S. v. U.S. Postal Serv., EEOC Appeal No. 0120181406 (Feb. 28, 2020) (failure to participate in email communications being sought by the Agency and to produce documentation ordered by AJ in a manner demonstrating disregard for administrative process and unwillingness to comply

with AJ's orders despite warning of consequences). The factors that justified our decision to uphold the AJ's dismissal of the complainants' hearing requests in Charley K. and Cleo S. are clearly present in this case. Like Charlie K., complainant's refusal to cooperate extended all the way back to the investigative stage of the process. And as in Cleo S., Complainant refused to provide information that was missing from the investigative report despite repeated warnings from the AJ that he would be sanctioned if he continued to engage in noncooperation. The information being sought by the Agency and the Investigator was central to Complainant's claim.

Furthermore, we find that Complainant's initial excuse for not appearing at the February 5, 2020 deposition, that he could not access the evidentiary record because he did not have a password, to be completely lacking in credibility, given that the AJ and Agency Counsel regularly communicated with him through ordinary email. The AJ rejected that excuse, Complainant introduced a second excuse; namely, that he became ill on the day of his deposition due to having to be questioned orally by the Agency's defense attorney. Complainant presented no supporting or credible evidence in support of this excuse as well. The AJ correctly determined that deterrence was necessary to prevent further harm to the integrity of the EEO process. Ultimately, we find that the AJ did not abuse her discretion when she dismissed Complainant's hearing request and will now move on to the merits of the case.

Denial of Reasonable Accommodation – Incident (1)

Agencies are required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9; Barney G. v. Dep't. of Agric., EEOC Appeal No. 0120120400 (Dec. 3, 2015). In order to establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. 1630.2(g); (2) he is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) ("Enforcement Guidance"). The accommodation that Complainant appears to be asking for is to communicate with management only in writing.

During the investigation, the EEO Investigator sent Complainant a medical release form and a set of questions related to his disability claim, including the nature and timing of the diagnosis, symptoms, and whether the condition was temporary or permanent. Complainant failed to respond to the Investigator's inquiry. IR 165-167, 169-70. In response to Complainant's request for a reasonable accommodation, Complainant's physician stated in a note dated June 5, 2019, that Complainant suffered from panic attacks and that this diagnosis was likely to be lifelong. As an accommodation, Complainant requested that communication with management be restricted to email and other forms of written communication in order to avoid triggering panic attacks.

The physician further stated that Complainant was willing to attend any group meetings with management as long as a union representative or other unbiased individual was present during those meetings. IR 263, 265, 267. Based upon this evidence, we find that Complainant is an individual with a disability. We will assume, for purposes of analysis, that he is a qualified individual with a disability.

The Agency maintained that it accommodated Complainant. The LRAC and the ALRAC averred that they attempted to facilitate an interactive meeting with Complainant to discuss his accommodation. They stated that they were both under the impression that the restriction on face-to-face communication did not apply to them because neither one of them was in Complainant's chain of command. IR 238-39, 254-55. According to the LRAC and the CP, Complainant was given the accommodation he requested on July 26, 2019, after receiving the June 5, 2019 medical note. Under the terms of the accommodation, Complainant's direct supervisor would communicate with him via email when possible for general communication and work assignments. In addition, the Agency would continue to work with Complainant and his supervisor in an attempt to identify and correct his concerns regarding the supervisor's work styles and communication strategies. IR 217-18, 220, 225-27, 239-43, 267, 322-23. To the extent that Complainant argues that such corrective actions on the part of the Agency are "irrelevant," we remind Complainant that while he is entitled to an effective accommodation, he is not entitled to the accommodation of his choice. Owen T. v. Dep't of the Army, EEOC Appeal No. 0120180596 (June 12, 2019) citing Lynette B. v. Dep't of Justice, EEOC Appeal No. 0720140010 (Dec. 3, 2015). Far from being irrelevant, the Agency's promise to help facilitate less stressful communication between Complainant and management was central to managing the condition for which Complainant requested accommodation. Thus, the accommodation provided by the Agency was a highly effective one. Thus, Complainant has not demonstrated that the provided accommodations were ineffective. In view of Complainant's failure to provide an affidavit or other evidence to the contrary, we find that the Agency fulfilled its obligation to provide him with a reasonable accommodation under the Rehabilitation Act.

Disparate Treatment – Incidents (2) and (3)

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). His first step would generally be to establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Const. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the PM, the LRAC and the ALRAC, articulated legitimate and nondiscriminatory reasons for their actions. See U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983).

As to incident (2), the PM affirmed that Complainant had been denied training on the SCID-5-RV protocols because he was not a clinician and therefore not required to administer or score those protocols. IR 171.

Regarding incidents (3a and 3d), the LRAC and ALRAC stated that they sought a face-to-face meeting with Complainant on March 13, 2019 to discuss his accommodation request and that they were both under the impression that the limitation of communication to writing did not apply to them because they were not in Complainant's management line. IR 238, 254. Concerning incidents (3b) and (3c), the PM asserted that she was unaware that the position description in question was for a new position, and that she informed Complainant of her error as soon as she was made aware of it, and offered to discuss with Complainant the assigned duties set forth in his existing position description. The PM further averred that in accordance with Complainant's request, a new position description was developed that matched his level of training. IR 182.

With regard to incident (3e), the PM confirmed that she provided Complainant with a letter of expectations which set forth his performance expectations, and when Complainant continued to have questions, she and Complainant met to discuss those concerns with a union steward present. IR 182-83, 189-91. As to incident (3f), the PM recalled that Complainant complained that he felt uncomfortable in the breakroom and the ACP looked into the matter and responded to Complainant's concerns. IR 183-84. Finally, with respect to incident (3g), the CP stated that while he was not involved in this matter, he has never heard of sharing interview scores with a candidate. Furthermore, the CP noted that position descriptions should be revised as needed, but generally they should be reviewed and updated about every five years. IR 217.

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the explanations provided by the LRAC, the ALRAC, and the PM are pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Hon. Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. Qpare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007), req. for recon. den. EEOC Request No. 0520080211 (May 30, 2008). In failing to provide an affidavit or submit to a deposition, Complainant has presented absolutely no evidence of a discriminatory or retaliatory motivation on the part of any named management official. He has not provided affidavits, declarations, unsworn statements nor documents from any source which contradict or undercut the explanations provided the various management officials named in the complaint or which call the truthfulness of those individuals into question. We therefore concur with the Agency that Complainant has not proven that he was subjected to discrimination or reprisal as alleged.

Hostile Work Environment

To the extent that Complainant is alleging that he was subjected to a hostile environment, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) that Complainant's claim of a hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the Agency's final decision because the preponderance of the evidence of record does not establish that discrimination occurred.

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).

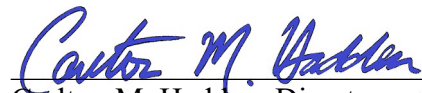
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **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

February 7, 2022
Date