



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Clarine L.,¹
Complainant,

v.

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

Appeal No. 2020004391

Hearing No. 570-2019-00982X

Agency No. HS-ICE-00979-2018

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 July 1, 2020 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

BACKGROUND

Complainant worked as a Staff Assistant, GS-0301-09 within the Systems Management Unit, Student and Exchange Visitors Programs in Arlington, Virginia. On February 20, 2018, Complainant filed an EEO complaint in which she alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of race (African-American), sex (female), color (Black), age (69), and reprisal (prior protected EEO activity) when:

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. On or about October 16, 2017, Complainant learned that her supervisor (S1a) had provided allegedly false statements in her performance work plan (PWP) and provided an inaccurate rating in order to preclude her from getting a job elsewhere;
2. In January 2018, the Agency failed to place Complainant into a Mission Support Specialist position and instead placed her into a position that entailed stenography work;
3. On several occasions during 2018, Complainant's documents, emails and/or correspondence regarding EEO matters were deleted and/or taken away from her;
4. In January 2018, after Complainant confronted an information technology specialist (ITS) for hitting the back of her leg, Complainant's supervisor (S1b) asked her whether she was trying to start a sexual harassment case;
5. In January and February 2018, S1b questioned Complainant about her attendance and attempted to intimidate Complainant by accusing her of committing fraud; and
6. On an unspecified date, Complainant was subjected to harassment regarding her work assignments, such as in May 2018, when S1b repeatedly requested Complainant provide notes that she did not have.²

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the investigative report (IR) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). On February 13, 2020, shortly after Complainant requested a hearing, the AJ assigned to the case issued an order of acknowledgment that scheduled the initial conference for February 19, 2020. Paragraph (7) of Section VII of the order specifies that parties are prohibited from engaging in ex parte communications with the AJ concerning the merits of the case. Section VIII of the order warned that the Administrative Judge may impose sanctions upon a party for failure to follow her orders, including dismissing Complainant's request for a hearing. On February 19, 2020, the AJ issued a case management order in which she set forth the scope and methods of discovery. The order repeated the prohibition on ex parte communications and that Complainant's hearing request could be dismissed as a sanction for failure to obey this or any other order from the AJ. On March 19, 2020, the AJ issued an updated case management order, noting that she became aware that Complainant needed further clarification on the framing of the issues, the discover process, and the management of the case. In response to Complainant's concerns the AJ ordered the parties to attend a second teleconference that day, during which she explained to Complainant the processing procedures again and received Complainant's acknowledgment that she understood the issues, the process, the deadlines, and the imposition of sanctions for failure to follow her orders.

² The Agency dismissed an additional claim regarding a detail assignment for untimely EEO Counselor contact. Complainant raised no challenges regarding this matter and the Commission can find no basis to disturb the Agency's dismissal. Nonetheless, the Commission will consider the claim as background evidence in support of Complainant's hostile work environment claim.

Complainant filed a motion dated April 16, 2020 to extend the discovery deadline by 60 days, from May 8, 2020 to July 7, 2020. She stated in her motion that she could not afford a computer, that the library where she was using a public computer had been closed due to the pandemic, and that she did not want to endanger herself by leaving her home. The certificate of service for the motion indicates that on April 20, 2020, it was emailed to the AJ and sent by mail to Agency Counsel. Appeal Brief, Exhibit 4. The AJ responded to Complaint by email on April 22, 2020 at 12:43 p.m. that she could not rule on Complainant's motion to extend the discovery deadline without more information. The AJ informed the parties that she was going to schedule a teleconference either that day, April 22, 2020 or on April 30, 2020. Agency Counsel indicated that either day would work. Five minutes later, the AJ asked Complainant whether she was available for the conference on April 22nd. The AJ further stated that if April 22nd did not work for Complainant, she would schedule the conference for 8:00 a.m. on April 30th. This email was sent to both parties on April 22, 2020 at 12:48 p.m. to their email address of record. Appeal Brief, Exhibit 8.

Complainant failed to appear at the scheduled teleconference and consequently, the AJ issued an Order to Show Cause, in which she stated that she:

issued a scheduling order for today, April 30, 2020, in order to speak to the parties, determine the status of discovery exchange, and find out why Complainant cannot engage in discovery via email. The scheduling order, like every order issued in the case once again stated that failure to comply with this order may result in sanctions. Complainant ignored the order and failed to appear. * * *

It is ordered that within 7 calendar days of this order, no later than May 7, 2020, Complainant shall send a written explanation for her failure to respond to the Agency's requests for clarification of her discovery requests and overall failure to engage in pursuing her complaint despite the clear fact that she has access to email/electronic communication, or be sanctioned by dismissal of her hearing request.

The Order to Show Cause was transmitted to Complainant via email and to Agency Counsel via FEDSEP. Complainant sent an email response to the AJ and to Agency Counsel on May 2, 2020 at 2:14 p.m. In her email, Complainant stated that she did not receive a request for a status call nor did she expect one since she was told that a decision had to be made by May 1, 2020 on her discovery extension request. She again asked for additional time to complete her discovery responses. Appeal Brief, Exhibit 10. In an email sent to Complainant on May 4, 2020 at 8:36 a.m., the AJ repeated that she had sent the parties a scheduling order on April 22, 2020 because the discovery extension request Complainant had sent her did not have sufficient information to make a proper decision. The AJ also stated that the email was sent via "reply all" in response to Complainant's emailed request for an extension.

Complainant responded by email sent to the AJ on May 4, 2020 at 10:33 a.m., in which she reiterated that she did not receive a request for a teleconference and had no idea whether the request for a conference was actually sent. Complainant also stated that there were problems with her getting emails. On May 5, 2020 at 8:20 a.m., the AJ sent an email to Complainant informing her that she had received Complainant's email and that since she alleged not to have a computer, the AJ, would make an exception in this instance and accept Complainant's explanation that she did not receive the order issued to all parties via email on April 22, 2020 as her response to the Order to Show Cause which the AJ issued upon Complainant's failure to appear for the ordered status conference. All these emails are included in Exhibit 11 to Complainant's appeal brief.

THE AJ'S DISMISSAL ORDER

The AJ issued her order dismissing Complainant's hearing request on May 7, 2020, citing the following as reasons for doing so:

- [At the initial conference held on February 19, 2020, the AJ] took extra time to explain proper procedure and communications with Complainant, who [was] pro se, and emphasized that no party was to contact the AJ without including the other party, as this constitutes an improper *ex parte* communication. *** At 11:16 am ET, the AJ issued the [Case Management Order] via email which contained language * * * reminding all parties to be *** mindful of avoiding *ex parte* communications. At 11:56 am that day, agency acknowledged receipt of the AJ's order via reply all. **At 12:03 pm on the same day, February 19, 2020, Complainant responded to the Judge alone, in an *ex parte* communication. Complainant was once again reminded in writing, in an email which included the agency, not to engage in *ex parte* communications as it is sanctionable.** [Emphasis added.] AJ Dismissal Order, p. 1
- [On] April 21, 2020, Complainant emailed a motion requesting a blanket 60-day extension to the May 8, 2020 deadline for production of discovery. Since the [Updated Case Management Order] was issued on March 19, 2020, Complainant has communicated via email with the AJ and the Agency over two dozen times, **including several additional *ex parte* communications with the AJ for which she was admonished in writing given her repeated disregard of the standing orders in this case.** [Emphasis added.] *** The AJ issued a scheduling order convening a status conference for April 30, 2020, in order to speak to the parties, determine the status of discovery exchange, and find out why Complainant cannot engage in discovery via email or whatever electronic method she has at her disposal, given that she has clearly used some sort of electronic apparatus in order to communicate continuously via email and access the Complainant's portal. The Agency and the undersigned waited on the conference line for fifteen minutes for Complainant to appear. **However, Complainant ignored the AJ's order in this case and failed to appear.** [Emphasis added.] AJ Dismissal Order, p. 2.

- After Complainant's failure to appear, an Order to Show Cause was issued citing Complainant's repeated and flagrant disregard for multiple orders in this case. **Complainant subsequently responded by engaging in *ex parte* communications two more times after the Order to Show Cause was issued (on May 5, 2020, and May 6, 2020.** [Emphasis added.] AJ Dismissal Order, p. 2.

The AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), in which it concluded that Complainant failed to prove that she was subjected to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant, through Counsel, contends that the AJ abused her discretion in dismissing her hearing request in the following manner:

- The AJ never issued an order for the April 30, 2020 teleconference Complainant missed. The Order to Show Cause and the Order of Dismissal stated that the AJ issued a scheduling order convening a status conference for April 30, 2020 in order to speak to the parties to determine the status of discovery exchange and find out why Complainant cannot engage in discovery via email or whatever electronic method she has at her disposal, given that she clearly used some sort of electronic apparatus in order to communicate continuously via email and access the Complainant's portal. **The record, however, contains no such order, and there is no evidence that the AJ ever issued such an order. At best, the AJ scheduled a telephone call by email, but the date was never confirmed, a conference line number was (not) provided and Complainant never confirmed her availability.** [Emphasis added.] Appeal Brief, p. 17.
- Complainant timely responded to the Order to Show Cause, explaining **I did not receive a request for a status call nor did I expect one . . .** [Emphasis added.] I have been using my cellphone to communicate with you . . . Aquantises [sic] have sent you information on my behalf. . . If you could please allow me some type of extension it would be most appreciated. At this point, it is obvious that I need a lawyer and cannot do this on my own. *** Please allow me additional time. Appeal Brief, Ex. 10. Despite [the fact] that Complainant credibly explained that she could open email via her phone but needed access to a computer to type discovery responses, the AJ still sanctioned her before Complainant's discovery responses even came due on May 8, 2020. Appeal Brief, pp. 17-18.
- Additionally, **the record does not even include the alleged *ex parte* communications the AJ referenced in her order of dismissal.** [Emphasis added.] Appeal Brief, p. 18

ANALYSIS AND FINDINGS

Standard of Review

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 Hearing Request as a Sanction

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 AJ’s discretionary authority includes the power to impose sanctions upon a party that fails to comply with his orders. Id. When the a party fails without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or 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 the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) Exclude other evidence offered by the party failing to produce the requested information or witness; (iv) Issue a decision fully or partially in favor of the opposing party; or (v) Take such other actions as 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 Veterans 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 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 recon. den. EEOC Request No. 2021000803 (Feb. 10, 2021).

Applying the first and fourth factors, we find that the alleged noncompliance consisted of the following incidents:

- An *ex parte* email from Complainant sent to the AJ on February 19, 2020 at 12:03 p.m.;
- An unspecified number of *ex parte* emails from Complainant sent to the AJ between March 19, 2020 and April 21, 2020, on unspecified dates and at unspecified times;
- Complainant's failure to appear at the teleconference scheduled for April 30, 2020 at 8:00 a.m.;
- After the AJ's issuance of her Order to Show Cause, an *ex parte* communication, presumably an email, sent to the AJ on May 5, 2020 at an unspecified time; and
- After the AJ's issuance of her Order to Show Cause, an *ex parte* communication, presumably an email, sent to the AJ on May 6, 2020 at an unspecified time.

As Complainant's Counsel rightly points out on appeal, however, no documentation of the alleged *ex parte* communications is present in the evidentiary record. The only emails from Complainant that appear to be *ex parte* were sent by Complainant to the AJ on April 19, 2020 at 8:16 a.m. and on May 4, 2020 at 10:33 a.m. Neither of those emails was cited by the AJ as incidents of noncompliance in her dismissal order. The April 19th email appears to have been sent in response to an automatic reply from the AJ. In the text of the message, Complainant states, "Please disregard the previous emails for extension; [t]hose motions have to be corrected." Appeal Brief, Exhibit 7. In her response to the May 4th email the following day, the AJ informed Complainant that as she would make an exception in this instance but did not specify what it was that she was making the exception for. A fair reading of this email suggests that the exception was to the prohibition on *ex parte* communications since that is what the AJ had received from Complainant. Further, the certificate of service for Complainant's motion to extend discovery clearly establishes that the motion was sent to both the AJ and Agency Counsel on April 20, 2020. Appeal Brief, Exhibit 4. An email from Complainant that was also included in the record was likewise sent to both the AJ and Agency Counsel on May 2, 2020 at 2:14 p.m. Appeal Brief, Exhibit 10. The most we can say about those two *ex parte* emails considering all the email traffic generated in this case is that Complainant may have been negligent in forgetting to include Agency Counsel.

As for Complainant's failure to appear at the teleconference that was scheduled for April 30, 2020, the only evidence that Complainant was informed of the conference was the email sent by the AJ to Complainant on April 22, 2020 at 12:48 p.m., in which the AJ asks Complainant whether she was available on that day for a conference and informs Complainant that if not, she will schedule the conference on April 30th. Appeal Brief, Ex. 8.

There is no actual formal scheduling order from the AJ dated April 22, 2020 that is present in the record nor is there any language in that email repeating the AJ's warning of consequences for noncompliance with her orders. Given Complainant's assertions that she did not have access to a computer in the public library because of the pandemic and that she sometimes had trouble receiving emails on her cell phone, Complainant's claim that she did not receive notice of the April 30, 2020 teleconference is not implausible. Without more definitive proof that Complainant had received that notice, the Commission cannot make a determination one way or the other. Ultimately, we agree with Complainant's Counsel that none of the incidents cited by the AJ to justify imposing the sanction of dismissing Complainant's hearing request find support in the evidentiary record.

In terms of the rest of the tailoring factors, i.e., prejudicial effects of Complainant's noncompliance upon the Agency, consequences of justice being delayed, and impact upon the integrity of the EEO process, the Commission generally holds that a complainant's hearing request should only be dismissed if the complainant either willfully disobeys the AJ's orders or unjustifiably fails to respond to those orders. Wilma B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020003672 (Dec. 2, 2021). Had the record in this case substantiated the AJ's findings regarding Complainant's multiple *ex parte* communications and her failure to appear for the April 30th teleconference, then dismissal of Complainant's hearing request may have been justified considering our assessment of those factors. However, in this case, the evidence relied upon by the AJ to justify imposing the severest sanction possible upon a party was not available to that party, making it impossible for the party to challenge the AJ's ruling. Upholding a hearing request dismissal under these circumstances would have a negative impact upon the integrity of the EEO process.³

CONCLUSION

Therefore, 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 hearing request on behalf of Complainant, as well the complaint file and a copy of this decision, to the EEOC Hearings Unit of the Washington Field Office within fifteen (15) calendar days of the date this decision is issued. 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 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.

³ To prevent similar situations from recurring, the Commission strongly advises that an Agency relying on an AJ's order issuing sanctions should ensure that the evidence and documentation the AJ relied upon in imposing sanctions is contained in the complaint file submitted on appeal.

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).

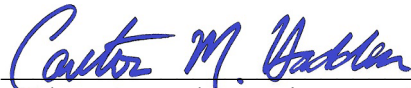
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

February 8, 2022

Date