



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

[REDACTED]  
Nina H.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021000962

Hearing No. 510-2019-00139X

Agency No. DOL-18-04-016

**DECISION**

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated October 26, 2020, finding no discrimination concerning her 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, we VACATE the Agency's final decision and REMAND the complaint for further processing.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Wage and Hour Investigator, GS-11, at the Agency's Wage and Hour Division, Sarasota Field Office, in Sarasota, Florida.

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

On November 20, 2017, Complainant filed an EEO complaint alleging discrimination and a hostile work environment based on national origin (Dominican), sex (female), disability (anxiety, depression, insomnia, skin condition), color (black), and in reprisal for prior EEO activity when:<sup>2</sup>

1. From September 2016 to the present, her supervisor has imposed restrictions on her ability to telework that are not imposed on her coworkers (requesting telework in advance, rather than the day of and providing details of what she will be working on).
2. In September 2016, her supervisor told her that she probably would not be getting her promotion to GS-11 from GS-9.
3. On September 28, 2016, her supervisor required her to take a “Pre-Basic Office Training” for new investigators, even though she had already completed that training, as well as “Basic I and Basic II” training.
4. Since January 2017, and continuing to the present, her supervisor continually assigns her cases during periods when she knows that she will be on leave, thereby giving her less than the usual 90-day period to complete said cases.
5. In an April 6, 2017 meeting with her supervisor, she said the following to her: (a) “Are you ready to go home? Are you ready to come home to Miami?”; (b) “Maybe you need to be home. You are sick and you are here alone without any support for you and your son during this time. Maybe it’ll be best if you left;” and (c) “Maybe this is not the job for you, maybe it’s too much for you and you cannot handle it.”
6. On an unspecified date between January 2017 and July 2017, her request for a hardship transfer was denied.
7. On July 18, 2017, her supervisor denied her request to use Family and Medical Leave Act (FMLA) leave that had been approved for intermittent use and instead charged her with being Absent Without Leave (AWOL).
8. In August 2017, her supervisor placed her on “informal counseling” because she was allegedly failing some of her performance standards.
9. In September 2017, her supervisor falsely accused her of being unavailable when she needed her and of taking more than her allotted fifteen minutes of break time.
10. In September 2017, her supervisor reassigned one of her cases on which she previously completed almost all of the work.

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<sup>2</sup> Although Complainant also alleged parental status as a basis of her claims, the Commission has no jurisdiction over the subject basis.

11. On September 5, 2017, her supervisor denied her request to postpone her informal counseling session because she was on the road working, and “wrote her up” when she failed to pull over to the side of the road to conduct the session telephonically.

12. On December 13, 2017, her supervisor issued her a Notice of Proposed Suspension.

After completion of the investigation of the complaint, Complainant requested a hearing before an EEOC Administrative Judge (AJ). On February 25, 2020, the AJ held an initial conference with the parties and issued an Order on Initial Conference and Deadlines and Record Completion. Therein, the AJ ordered the parties to initiate the discovery process on or before March 16, 2020, and complete discovery on or before June 16, 2020.

On February 28, 2020, the Agency initiated discovery and issued [the Agency’s] First Interrogatories and Requests to Complainant. We note that this document is missing from the record.

On April 29, 2020, the Agency filed an Agency’s Motion to Compel Response to [the Agency’s] First Set of Interrogatories, Requests for Admissions and Request for the Production of Documents to Complainant. Therein, the Agency indicated that on April 3, 2020, it contacted Complainant who told the Agency that she retained an attorney to represent her and provided the Agency with the attorney’s contact information. The Agency further indicated that on April 10, 2020, the Agency contacted Complainant’s attorney and they discussed Complainant’s overdue discovery responses. According to the Agency, Complainant’s attorney assured the Agency that Complainant’s answers and responses would be transmitted by April 17, 2020. The Agency stated that Complainant failed to do so. The Agency also indicated that on April 21, 2020, the Agency again talked to Complainant’s attorney about Complainant’s discovery responses. As of April 29, 2020, the Agency did not receive Complainant’s discovery responses.

On June 1, 2020, the Agency filed a Revised Motion to Compel, Renewing [the Agency’s] Motion as to [Complainant’s] Response to [the Agency’s] First Set of Interrogatories and Requests for the Production of Documents. Therein, the Agency indicated that on May 19, 2020, Complainant provided responses to the Agency’s requests for Admissions and Requests for the Production of Documents. We note that Complainant’s May 19, 2020 response is missing from the record. The Agency stated that Complainant however did not attach any of the documents referenced within her responses to the Agency’s Requests for Production and Complainant did not respond to the Agency’s Interrogatories. The Agency further stated that on May 19, 2020, the Agency talked to Complainant’s attorney and inquired about Complainant’s responses to the Interrogatories and Requests. Complainant’s attorney informed the Agency that Complainant needed to gain access to a storage unit in order to provide the responses and documents. The Agency indicated that it has not received Complainant’s discovery responses as of this time.

On June 1, 2020, the AJ issued an Order on Agency's Motion to Compel granting the Agency's motion. Therein, Complainant was instructed to respond to the Agency's discovery requests within 15 days of the date of this order, otherwise her hearing request would be dismissed as a sanction.

On June 1, 2020, the AJ issued an Order on Complainant's Motion for an Extension denying Complainant's motion to extend the time for the initiation of discovery. We note that Complainant's Motion for an Extension is missing from the record. The AJ stated that on May 31, 2020, the parties filed a Joint Motion to Extend the deadline for the termination of discovery which was June 16, 2020. We note that this Joint Motion to Extend is missing from the record. The AJ granted the Joint Motion to Extend the deadline for the termination of discovery to August 16, 2020.

On June 17, 2020, the AJ issued an Order on Complainant's Motion for Extension/Order to Show Cause denying Complainant's motion because it was filed untimely. Specifically, the AJ stated that on June 16, 2020, at 6:47 p.m., Complainant moved for an extension of time by which to comply with the AJ's June 1, 2020 order wherein which she was given 15 days to comply with discovery or face sanction, described above. We note that Complainant's June 16, 2020 Motion for Extension is missing from the record. The AJ ordered Complainant to submit in writing, within 15 days of this order, good faith reasons why she should not be sanctioned for her repeated violations of the AJ's orders. The AJ further notified Complainant that her failure to follow this June 17, 2020 order would result in sanctions, including dismissal of her hearing request.

On July 6, 2020, the Agency filed [the Agency's] Motion to Dismiss for Failure to Respond to Discovery and Comply with the Order of [the AJ]. Therein, the Agency stated that on June 16, 2020, Complainant's attorney contacted the Agency and asked if the Agency would oppose Complainant's request for an extension of time in which to comply with the AJ's June 1, 2020 order on the Agency's Motion to Compel due to a death in the family. The Agency responded to Complainant's attorney that it would not oppose an extension if Complainant would provide some sort of documentation of the death. Complainant failed to provide any documentation of the death. The Agency further stated that on July 1, 2020, Complainant's attorney sent an email entitled "document production" with attachment of various documents. We note that this email, including attached documents, are missing from the record. The Agency indicated that the attached documents did not appear to be in any specific order and there was no reference to anything, and they were not responsive to the Agency's production of document request. The Agency further indicated that on July 2, 2020, the Agency inquired as to whether Complainant planned to organize the document production, but Complainant failed to respond. The Agency stated that Complainant failed to respond to its discovery requests and interrogatories. The Agency further stated that without Complainant's responses, it would not be able to defend Complainant's claim and the Agency was prejudiced. The Agency stated that Complainant's Response to Order to Show Cause ignored the months of delay caused by her as well as the complete lack of responsiveness on the part of her during these months. We note that Complainant's Response to Order to Show Cause is missing from the record.

The Agency noted that Complainant's assertions that the coronavirus pandemic affected her ability to respond to the Agency's discovery ignored the fact that the Agency served discovery on February 28, 2020, well-before the pandemic caused disruption.

On August 21, 2020, the AJ issued an Order on Agency's Motion for Sanctions/Order of Dismissal. Therein, the AJ stated that the Agency filed its Motion for Sanctions on July 1, 2020, and Complainant filed a response on July 2, 2020, asserting that her failure to comply with orders was not problematic and that the Agency received the discovery requested. We note that the Agency's July 1, 2020 Motion for Sanctions and Complainant's July 2, 2020 response are missing from the record. The AJ stated that Complainant repeatedly failed to follow the AJ's orders and cooperate with the discovery process which caused the prejudicial effect on the Agency's ability to prepare an adequate defense to Complainant's claims and resulted in undue delay. The AJ granted the Agency's Motion for Sanctions for Complainant's repeated violations of the AJ's orders, dismissed the complaint from the hearing process, and remanded the complaint to the Agency for issuance of a final Agency decision.

Accordingly, the Agency issued its final Agency decision concluding that Complainant failed to establish that she was subjected to unlawful disparate treatment or a hostile work environment as alleged.

Complainant appeals. Complainant argues that the AJ improperly dismissed her hearing request for failure to comply with the AJ's orders. Complainant indicates that during the pendency of the hearing process, she had health conditions due to coronavirus pandemic and personal family loss. Specifically, Complainant states that: from January 2, 2020 through March 10, 2020, she had an arm fracture, surgery, and rehabilitation; since March 2020 through present, there was the coronavirus pandemic; from June 11, 2020 through June 19, 2020, she had her maternal grandmother's death and bereavement; and from June 21, 2020 through July 1, 2020, she and her son were quarantined to monitor coronavirus symptoms. Complainant submits a medical statement, dated December 17, 2020, indicating that from January 2, 2020 through March 10, 2020, she was under orthopedic care for her arm fracture and rehabilitation; and due to pain control medication, she was unable to drive, and she was in a no working status. Complainant also provides a medical letter, dated July 8, 2020, indicating that from June 23 through July 6, 2020, she had been in quarantine because she and her son had exposure to contact with Covid-19 and she had to monitor her symptoms.

### 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 (EEO MD-110), Chap. 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").

*Dismissal of Complainant's 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 a complainant,

fail[s] 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 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. Id.

We have consistently held in recent decisions that dismissal of a hearing request as a sanction is only appropriate in extreme circumstances. One such circumstance is when a complainant engages in contumacious conduct. 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 (March 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); 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). Absent a showing of contumacious conduct, hearing requests may be dismissed where a 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).

There must be a showing that Complainant either willfully disobeyed the AJ's orders or unjustifiably failed to respond to those orders in order to warrant dismissal of the hearing request as a sanction. In the absence of either circumstance, we cannot find that the integrity of the process had been so compromised as to warrant the most severe sanction. In the instant case, the record is devoid of the following documents: the Agency's February 28, 2020 First Interrogatories and Requests; Complainant's May 19, 2020 response to the Agency's First Set of Interrogatories and Requests; Complainant's Motion for an Extension, referenced in the AJ's June 1, 2020 order denying such motion; the parties' May 31, 2020 Joint Motion to Extend; Complainant's June 16, 2020 Motion for Extension; Complainant's attorney's July 1, 2020 email, including attached documents, in response to the Agency's production of documents request; the Agency's July 1, 2020 Motion for Sanctions; Complainant's July 2, 2020 response to the Agency's July 1, 2020 Motion for Sanctions; and Complainant's Response to Order to Show Cause. Due to these deficiencies, we are unable to independently assess the adequacy of Complainant's responses to the Agency's discovery requests or her good faith reasons for purportedly failing to comply with the AJ's orders if found. See Clarine L. v. Department of Homeland Security, EEOC Appeal No. 2020004391 (February 8, 2022) (AJ's sanction dismissing complainant's request found to be too harsh due to insufficient record); Edward W. v. Soc. Sec. Admin., EEOC Appeal No. 2019005957 (Apr. 15, 2021) (AJ's sanction dismissing complainant's hearing request found to be too harsh due to insufficient record).

Based on the foregoing, we find that the record is insufficient to demonstrate that Complainant had engaged in the kind of willful or obstinate refusal to comply with an AJ's orders that typifies contumacious conduct or that she willfully failed to act with due diligence. Therefore, we find that the AJ's dismissal of Complainant's hearing request was too harsh a sanction in that it prematurely curtailed the proceeding.

The same advice we provided in Clarine L., EEOC Appeal No. 2020004391 applies here: “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.”

### CONCLUSION

The Commission VACATES the Agency’s final decision and REMANDS the complaint to the Agency for further action in accordance with this decision and the Order herein.

### ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit in Miami, Florida, within 15 calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall 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.

### IMPLEMENTATION OF THE COMMISSION’S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission’s corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency’s final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission’s order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission’s order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.



Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

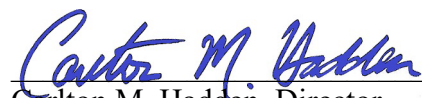
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

March 15, 2022

Date