



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Bruce P.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Drug Enforcement Administration),
Agency.

Appeal No. 2021004818

Hearing No. 570-2017-00708X

Agency No. DEA-2015-02028

DECISION

Following its August 31, 2021 final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) default judgment in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission VACATES the Agency's final order and REMANDS the complaint.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Unit Chief and Acting Assistant Special Agent in Charge at the Agency's International Training Section in Quantico, Virginia.

On July 30, 2015, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of national origin (Hispanic and Mexican/American) when on June 23, 2015, he received notice that he was not selected for the position of Assistant

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.

Special Agent in Charge (ASAC), International Training Section, Office of Training, advertised under Vacancy Number CMB-15-345.

On October 19, 2015, the Agency amended the complaint to include Complainant's allegation that he was discriminated against in reprisal for prior EEO activity when on September 7, 2015, a Special Agent in Charge (SAC) held an International Training Section Unit Chiefs meeting and excluded Complainant from the meeting. Complainant contends that when one of the attendees asked why Complainant was not invited to the meeting, SAC responded that "[Complainant] wasn't invited because he is pissed at me for not picking him as the International ASAC." On October 29, 2015, Complainant filed a second amendment to include the allegation that he was retaliated against when on October 16, 2015, Complainant received a reduced performance rating of "Significantly Exceeds Expectations."

On February 23, 2017, the Agency sent Complainant a copy of the investigative file, and he requested a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). On July 20, 2017, Complainant filed a Motion for Default Judgment as a sanction for the Agency's failure to timely complete the EEO investigation. Complainant noted that the deadline to complete the investigation was April 26, 2016, but the Agency did not issue the Report of Investigation (ROI) until February 24, 2017, which was 304 days after its deadline. The Agency opposed Complainant's motion on August 10, 2017, noting that the delay in the investigation was for good cause. Complainant replied to the Agency's opposition on August 21, 2017.

On November 15, 2018, the AJ issued a Decision Entering Default Judgment against the Agency for its failure to comply with the requirements to timely process the investigation of Complainant's complaint, without good cause for the delay. The AJ noted that the Agency received a draft ROI on July 26, 2016, approximately 60 days late. However, the ROI contained numerous deficiencies and had to be returned to the EEO investigator for a supplemental investigation. The Agency claimed that critical witnesses were unavailable due to overseas assignments, but the AJ was not persuaded that these witnesses were not available in the age of technology and email. The AJ also determined that the Agency failed to convey a sense of urgency and importance to the witnesses. As such, the AJ found that the Agency did not show good cause for its delay when it completed the ROI on February 23, 2017, which was well past its deadline of April 26, 2016. The AJ concluded that a default judgment was supported by prior Commission decisions and appropriate based on the circumstances.

On July 22, 2021, the AJ issued a Decision on Liability and Relief. The AJ found that Complainant did not establish a prima facie case of national origin discrimination when he was not selected for the ASAC position. The AJ noted that the Career Board, which consists of a group of Agency Senior Executives from Agency Headquarters and the field, made a recommended selection, and that the then-Chair of the Career Board was unaware of Complainant's national origin. Regarding the reprisal claims, the AJ found no evidence of a causal link between Complainant's protected EEO activity and his exclusion from the new Unit Chiefs meeting or his rating of "Significantly Exceeds Expectations."

As relief, the AJ ordered: (1) a minimum of sixteen hours of training to its EEO managers and staff regarding their responsibilities concerning case processing and ensuring that investigations are completed in a timely manner; (2) that the Agency consider taking disciplinary action against all responsible EEO officials still employed by the Agency who were involved in the processing of this complaint; (3) payments in the amount of \$17,750.98 for attorney fees and \$325.01 in costs and expenses; and (4) a posting notice of the Agency's violation and failure to comply with the Commission's regulatory timeframes.

The Agency issued a final order rejecting the AJ's decision to grant a default judgment and filed the instant appeal. Complainant did not respond to the Agency's appeal.

CONTENTIONS ON APPEAL

The Agency argues that the AJ's decision to grant a default judgment is improper based on Miguelina S. v. Department of Justice, EEOC Request No. 2019002953 (January 27, 2020). The Agency asserts, that in the absence of an AJ order, a default judgment is a result of a failure to follow appropriate procedures, and the AJ lacked the authority to issue a sanction in the absence of a violation of a prior order or request.

In addition, the Agency contends that a sanction of a default judgment was inappropriate because it was not tailored to the situation, and the record indicates that the AJ failed to properly consider the relevant factors when fashioning the default judgment sanction. Rather, there is no evidence that the Agency ever intentionally disregarded the regulatory timeframe set forth in 29 C.F.R. 1614.108(e); attempted to interfere with the exercise of Complainant's rights; or that there was any prejudice or adverse consequence resulting from the delay. As such, the Agency asserts that a default judgment was too harsh a sanction.

The Agency argues that the AJ's subsequent Decision on Liability and Relief was premised entirely on this erroneous grant of default judgment. The Agency requests that the Commission vacate the AJ's Decision Entering Default Judgment Against the Agency and the AJ's Decision on Liability and Relief; and remand the case for further action.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo).

This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (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”).

ANALYSIS AND FINDINGS

EEOC regulations confer upon its AJs “full responsibility for the adjudication of the complaint, including overseeing the development of the record.” 29 C.F.R. § 1614.109(a). During the hearing stage, the AJ also ensures the integrity and efficiency of the administrative process. In executing such responsibility, an AJ is authorized, among other things, to “impose appropriate sanctions on parties who fail to comply with orders or requests.” EEO MD-110 at Chap. 7, § III(D). Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016), citing Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 n.3 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC).

In this case, the AJ issued a default judgment as a sanction for the Agency's undisputed failure to meet the regulatory timeframes for conducting the investigation. While the Agency contends that the AJ's default judgment should be vacated because the AJ lacked the authority to issue a sanction in the absence of a violation of a prior order or request, the Commission has found that show cause orders are unnecessary where a party has filed a motion for specific sanctions and the non-moving party has had an opportunity to respond. See e.g. Council v. Dep't of Veterans Affs., EEOC Appeal No. 0120080321 (Apr. 9, 2010) (show cause order not necessary because the employee was previously placed on notice of the sanctions that could be imposed for failure to timely submit a pre-hearing statement); Vandesande v. U.S. Postal Serv., EEOC Appeal No. 07A40037 (Sept. 28, 2004) (a default judgment was appropriate since the agency was given an opportunity to demonstrate why sanctions should not be levied).

Commission precedent has established that as long as the offending party is provided with notice of a possible imposition of a sanction, the type of sanction, and the opportunity to explain why that sanction should not be imposed, the particular form in which the party receives that notice does not matter. See Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018).

We find that Complainant's Motion for Default Judgment gave the Agency sufficient notice of the possibility of a default judgment, and that the Agency had the opportunity to be heard when it filed its opposition to Complainant's motion and argued that the AJ should not issue a default judgment. As such, the AJ acted properly within her authority to sanction the Agency.

However, we find that the AJ abused her discretion when she issued a default judgment as a sanction because she did not fully consider the relevant factors in determining an appropriate sanction, which must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. A sanction may be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. If a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, an AJ may be abusing his or her discretion to impose a harsher sanction. Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and 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; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007).

While the AJ noted the Agency's responses when she determined that it had not shown good cause for its delay in issuing the ROI, she did not analyze any prejudicial effect on Complainant; the consequences of the delay in justice; or the effect on the integrity of the EEO process when she concluded that a default judgment was appropriate. We find that the AJ abused her discretion by failing to provide her analysis indicating that the sanction was tailored to this case. See Voysest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan. 18, 2005) (the AJ abused his discretion by issuing a sanction that was not "tailored").

EEOC Regulation 29 C.F.R. § 1614.109(f)(3) specifically sets forth the types of sanctions an AJ may take when required by the appropriate circumstances. An AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate. Id.

We conclude that the AJ should have selected a more narrowly tailored sanction than a decision fully in favor of the opposing party. Such a sanction should be specifically designed to serve the purpose of deterring the agency from engaging in similar conduct in the future, without being overly harsh in light of the nature of the offense. Under the facts of this case, we find that an evidentiary sanction is more appropriate. Therefore, as sanction, the Agency is prohibited from using the affidavits or exhibits contained in the ROI to support either a motion to dismiss or a motion for summary judgment, in part or in whole, and the Agency cannot rely upon affidavits contained in the ROI in lieu of witnesses who are unavailable to either testify at the hearing or provide testimony by other means authorized by the AJ. See 29 C.F.R. § 1614.109(f)(3)(iii) and (v). Such a sanction will effectively emphasize to the agency the need to comply with AJ orders, as well as relevant timeframes during the investigation of EEO complaints.

Accordingly, we VACATE the Agency's final order rejecting the AJ's Decision Entering Default Judgment Against the Agency and the AJ's Decision on Liability and Relief. As this will leave no decision rendered on the merits of the complaint, we REMAND the complaint back to the hearing stage in accordance with this decision and the Order set forth below. In the interest of judicial economy and to expedite the processing of this case on remand, the Commission will impose the alternative sanction discussed above on the Agency during the hearing process.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order rejecting the AJ's Decision Entering Default Judgment Against the Agency and the AJ's Decision on Liability and Relief; and REMAND the matter in accordance with our order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the Hearings Unit of the EEOC's 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 Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109. The Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

The Agency is further directed to submit a compliance report in accordance with the statement entitled "Implementation of the Commission's Decision."

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).

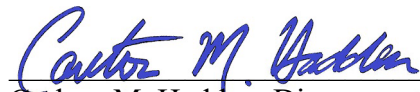
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

March 7, 2022

Date