



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

[REDACTED]
Wilma B.,¹
Complainant,

v.

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

Appeal No. 2020003672

Hearing No. 520-2017-00564X

Agency No. 200H-0689-2016102716

DECISION

Complainant filed an appeal² with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 30, 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.

BACKGROUND

Complainant worked as a Medical Administrative Specialist, GS-0301-09, at the Veterans Integrative Services Network in West Haven, Connecticut. In an EEO complaint initially filed on June 6, 2016 and amended on September 29, 2016, Complainant alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of sex (female), race

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 This initially premature appeal has since been cured by the Agency's issuance of its final decision.

(Hispanic/Latina)³, national origin (Puerto Rican), and reprisal (prior protected EEO activity) when:

1. On March 3, 2016, Assistant Health Administrative Services Chief (AHASC) directed Complainant to abstain from working with patients during the upcoming weekend;
2. On March 3, 2016, the Patient Services Manager (PSM) informed Complainant that there would be a fact-finding inquiry regarding her involvement with a fundraising website;
3. On March 9, 2016, PSM conducted a fact-finding interview with Complainant and then removed Complainant from patient care duties and assigned her to administrative duties for the duration of the fact-finding;
4. From March 9, 2016 through April 13, 2016, PSM, AHASC, the Health Administrative Services Chief (HASC), and the Associate Director (AD) failed to respond to Complainant's inquiries about the extension of the fact-finding and her restricted duties;
5. On March 25, 2016, AD declined to speak to Complainant after he indicated to her on March 18, 2016, that he would do so;
6. On March 28, 2016, PSM conducted another fact-finding interview with Complainant, yet during the interview and afterward, PSM would not provide any information to Complainant regarding the fact-finding or her restricted administrative duties;
7. On March 29, 2016, PSM required Complainant to sign a document regarding the March 28, 2016 fact-finding interview;
8. In April 2016, PSM and HASC delayed approving Complainant's request for eight days of sick leave;
9. On September 1 and 2, 2016, PSM informed two of Complainant's coworkers that Complainant was going to be suspended prior to the decision on the proposed suspension;
10. On September 12, 2016, HASC served Complainant with a 14-day suspension; and
11. On September 12, 2016, PSM issued Complainant a written counseling.

³ Although Complainant designated her race as "Hispanic," the Commission recognizes this term as an indication of national origin rather than race.

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant, through counsel, requested a hearing on May 19, 2017. In an acknowledgement order dated April 1, 2019, the AJ set the prehearing conference for April 17, 2019 and advised the parties that failure to follow his orders could result in sanctions, up to and including dismissal of the hearing request.

Pursuant to the Agency's unopposed request, the AJ granted a continuance for the prehearing conference until May 9, 2019. On May 10, 2019, the day after the prehearing conference, the AJ issued a case management order setting forth discovery deadlines of May 30, 2019 for the Agency to propound and July 1, 2019 for Complainant to answer. The order repeated the warning from the acknowledgement and scheduling order that parties who do not comply with the orders are subject to sanctions up to dismissal of the hearing request.

On May 24, 2019, Complainant and the Agency submitted a joint motion for an extension of time to initiate discovery. Both parties requested an extension until June 7, 2019. On May 30, 2019, the AJ granted the parties' request, setting the deadline for the Agency to propound at June 7, 2019 and for Complainant to answer at July 8, 2019. The AJ included the same warning from his previous orders that noncompliance could result in sanctions up to dismissal of the complaint.

On July 9, 2019, Complainant filed a motion for an extension of time until July 23, 2019 to respond to the Agency's discovery requests. Complainant's attorney had taken ill on June 28, 2019 and had been on medical leave throughout July. As a result, the law firm that employed the attorney had to reassign 70 cases being handled by that attorney to other attorneys, including Complainant's case. Upon being assigned Complainant's case on July 9, 2019, Complainant's second attorney contacted the AJ to inquire about any pending discovery deadlines. He also filed a motion by consent for extension to respond to Agency discovery.

On July 12, 2019, the AJ denied Complainant's extension request. The AJ stated that the second attorney's representation began on July 9, 2019, after Complainant's deadline to answer had already expired. The AJ further stated even though Complainant was already on notice that she would be subject to sanctions for noncompliance, he would nevertheless give her until July 19, 2019 to show cause as to why her hearing request should not be dismissed for failure to comply with his May 30, 2019 order.

On July 19, 2019, Complainant's second attorney submitted her response to the AJ's show cause order. Counsel repeated Complainant's assertion that her first attorney was on medical leave and had been unable to work on her case since June 28, 2019. He reiterated that Complainant's first attorney's unexpected departure forced the law firm to reassign 70 of his cases, which made it exceedingly difficult to ascertain the status of all of those cases within such a short time frame. Complainant's second attorney stated that he filed a motion for extension of time to complete discovery to which the Agency consented, and that he contemporaneously provided Complainant's responses to the Agency's discovery requests along with her response to the show-cause order.

On August 1, 2019, the AJ issued an order dismissing Complainant's hearing request after finding that Complainant failed to comply with his May 30, 2019 order. The AJ stated that while Complainant's second attorney was diligent in inquiring about discovery deadlines, his representation of Complainant began after the expiration of the July 8, 2019 response deadline. The AJ also stated that Complainant's previous counsel "had and lost the opportunity to timely seek an extension of the deadline." In deciding to dismiss Complainant's hearing request rather than impose a lesser sanction, the AJ stated, that, "failure to timely respond to discovery requests warrants sanctions," and "a showing that the noncomplying party acted in bad faith is not required to justify sanctions." The AJ reiterated that bad faith is not the determinative factor, and stated, "with noncompliance in this case, but without contumacious conduct, the appropriate sanction under these specific circumstances is to remand the complaint for an immediate final decision."

The AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded in its decision that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

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 the 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. Id.

Applying the first and fourth factors, we find that Complainant's noncompliance with the AJ's orders consisted solely of her failure to respond to the Agency's discovery requests by the assigned deadline of July 8, 2019. Complainant's stated reason for her noncompliance was that her first attorney had suddenly taken ill on June 28, 2019 and could no longer represent her due to being out on extended medical leave. Complainant's new attorney immediately contacted the AJ and the Agency in order to ascertain pending deadlines and was commended by the AJ for doing so. Applying the second and third factors, we find that the prejudicial effects of Complainant's noncompliance with the May 30, 2019 order as well as any consequences resulting from the delay in justice were minimal since the Agency agreed to the extension until July 23, 2019 and Complainant's second attorney had provided Complainant's responses to the Agency's discovery requests on July 19, 2019, the day she responded to the AJ's show cause order. We note that in its appeal brief, the Agency does not contest either point.

The AJ held that absent a finding of contumacious conduct, the appropriate sanction is to dismiss the hearing request. In support of this position, the AJ cites to decisions that we issued between 2005 and 2008. In applying the fifth factor, however, we have consistently held in more recent decisions that dismissal of a hearing request as a sanction is only appropriate in extreme circumstances. One such circumstance is when the complainant engages in contumacious conduct, not merely negligence. 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).

Absent a showing of contumacious conduct, hearing requests may be dismissed where the complainant fails to pursue his or her claim with due diligence. Alice S. v. Soc. Sec. Admin., EEOC Appeal No. 2019002475 (Sept. 22, 2020) (failure to respond to emails from AJ that included initial conference order and order to show cause due to overlooking those emails); Robert A. v. U.S. Postal Serv., EEOC Appeal No. 0120182698 (Feb. 21, 2020) (failure to respond to order to show cause despite having received order from AJ via email, and failure to provide evidence that he was incapacitated and unable to comply with the order).

These recent cases demonstrate that there must be a showing that Complainant either willfully disobeyed the AJ's orders or unjustifiably failed to respond to those orders to justify dismissal of the hearing request as a sanction. In the absence of either circumstance, we cannot find that the integrity of that process had been so compromised as to warrant the most severe sanction. When a lesser sanction would normally suffice to deter the conduct and to equitably remedy the opposing party an AJ may be abusing his discretion by dismissing the complaint. See Georgianne B. v. Dep't of Agric., EEOC Appeal Nos. 0120181591 & 0120181592 (Feb. 27, 2020) (dismissal of hearing request rejected on appeal where AJ dismissed hearing request outright rather than grant Agency's motion to compel discovery or limiting the complainant's discovery when the complainant failed to appear at the initial conference and failed to respond to a discovery request despite the fact that the parties and the AJ remaining in continuous email correspondence in an effort to litigate the case); Drucilla Y. v. Dep't of the Treasury, EEOC Appeal No. 0120182728 (Feb. 27, 2020) (dismissal of hearing request rejected on appeal where the complainant made earnest but unsuccessful effort to comply with an onerous acknowledgement and scheduling order). See also e.g. Melinda S. v. U.S. Postal Serv., EEOC Appeal No. 2019005174 (June 16, 2021) (dismissal of hearing request overturned where the complainant demonstrated in response to a show-cause order that she had been suffering from an incapacitating medical condition notwithstanding that she had failed to provide details of that condition or request an extension of time); and Sylvester C. v. U.S. Postal Serv., EEOC Appeal No. 2019004212 (Feb. 2, 2021) (dismissal of hearing request overturned where there was no showing that the complainant received emails from the AJ notifying him about the prehearing conference),

With the foregoing considerations in mind as we apply the fifth factor, we find that through no fault of her own, Complainant was unable to comply with the AJ's May 30, 2019 order to respond to the Agency's discovery requests. The law firm representing Complainant was beset by a sudden and unexpected crisis that directly impacted upon Complainant's ability to comply with that order. When Complainant's first attorney became ill at the end of June 2019, 70 of his cases, including Complainant's, had to be assigned to other attorneys who had to be brought up to speed on those cases within short time frames in addition to handling their own workloads. Complainant's second attorney was not assigned her case until one day after the July 8, 2019 deadline had passed, a situation over which Complainant plainly had no control. Upon taking over Complainant's case, her second attorney immediately contacted the AJ and the Agency in an effort to keep the case moving. He did so by requesting the Agency's consent to an extension to July 23, 2019, which the Agency granted, and by responding to the Agency's discovery requests four days before his self-imposed deadline of July 23, 2019.

Thus, there does not appear to be any indications that Complainant or her attorneys had engaged in the kind of willful or obstinate refusal to comply with an AJ's orders that typifies contumacious conduct. Such behavior was clearly present and on display in Charlie K. and Cleo S. but lacking in Georgianne B., Drucilla Y., Melinda S., and Sylvester C. Likewise, we do not find that either Complainant or her attorneys willfully failed to act with due diligence with respect to the Agency's discovery requests, as was the situation in Alice S. and Robert A. Rather, the worst that could be said about Complainant is that she was negligent in failing to respond to those requests between June 28 and July 8, 2019.

We therefore find that the AJ's dismissal of Complainant's hearing request was too harsh a sanction. Any one of the lesser sanctions listed in subsections (i), (ii), or (iii) of section 109(f)(3) would likely be more appropriate to address Complainant's noncompliance with the AJ's May 30, 2019 order to respond to the Agency's discovery requests. Thus, we can discern no harm to the integrity of the EEO process in this case, especially in light of the Agency's consent to extend Complainant's discovery response deadline until July 23, 2019.

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 New York District 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.

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

December 2, 2021

Date