



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

[REDACTED]
Eldon P.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2022002176

Hearing No. 410-2020-00467X

Agency No. DON 20-67100-00631

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 9, 2022, dismissing his complaint alleging unlawful 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Industrial Engineering Technician, GS-0895-11, for the Agency's Program Management Division, Production Plant Albany, Marine Depot Maintenance Command in Albany, Georgia.

On December 6, 2019, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (African American), color (Black), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. on September 19, 2019, Complainant was not selected for the position of

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.

Supervisory Production Analysis Specialist, GS-0301-12, under job announcement number ST-10578806-19-GJL at the facility; and

2. on November 1, 2019, Complainant was not selected for the position of Production Controller, GS-1152-12, at the facility.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing. On January 4, 2022, the AJ dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(6). Specifically, the AJ found that emails sent to Complainant's email address of record generated undeliverable receipt notices and Complainant failed to respond to voicemails left by the AJ at Complainant's telephone number of record. The AJ noted that after the Agency provided updated contact information for Complainant, the AJ issued another order requiring a response from Complainant within ten days. When no response was forthcoming, the AJ dismissed the complaint.

Subsequently, the Agency issued a final order fully implementing the AJ's decision to dismiss Complainant's complaint. Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

An AJ has the authority to impose sanctions on a party that fails to comply, without good cause, with orders or requests. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at 7-10 (Aug. 5, 2015) (citing 29 C.F.R. § 1614.109(f)(3)). However, such sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000). 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. Id. 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. Id. Dismissal of a complaint by an AJ as a sanction is only appropriate in extreme circumstances, where the complainant has engaged in contumacious conduct, not simple negligence. Id.

In the present case, emails sent to Complainant's email address of record generated undeliverable receipt notices, Complainant failed to respond to voicemails left by the AJ at his telephone number of record, and Complainant did not respond to the AJ's order requiring a response within ten days, or to the Notice of Proposed Dismissal. However, we find that Complainant's behavior did not rise to the level of contumacious conduct. Specifically, we find that the facts in Complainant's case are analogous to those in Black v. Dep't of the Treasury, EEOC Appeal No. 0120073275 (Feb. 11, 2011), request for reconsideration denied, EEOC Request No. 0520110370 (May 20, 2011) and Frederick A. v. Department of the Navy, EEOC Appeal No. 0120140377 (June 15, 2016)

In Black, we reversed the AJ's dismissal of the complaint because the complainant's behavior (failure to respond to the agency's discovery requests, the AJ's order to respond to the agency's discovery requests, and the AJ's show cause order) did not rise to the level of contumacious conduct. Similarly, in Frederick A., we found that Complainant's failure to provide complete discovery responses or respond to the Agency's motions to compel, the AJ's order to compel and the Agency's motion for dismissal did not amount to contumacious conduct. The Commission, in Frederick A., reversed the AJ's dismissal. Here, we find that the AJ abused his discretion when he dismissed Complainant's complaint in its entirety.

It is well-settled that when we find that a complainant has not cooperated in the hearings process, absent a finding of contumacious conduct, the appropriate sanction is to dismiss the hearing request, and remand the complaint to the agency to issue a final agency decision on the record. See Byers v. Dep't of Homeland Sec., EEOC Appeal No. 0120082542 (Nov. 7, 2008); Bates v. Dep't of Veterans Affairs, EEOC Appeal No. 0120063654 (Nov. 30, 2007); Cole v. Dep't of the Navy, EEOC Appeal No. 01A42577 (Feb. 16, 2005). Given that the Agency conducted a full investigation of the complaint, we find that the appropriate sanction here is to return the complaint to the Agency for a final decision on the merits. We find that the record as developed in the investigative process is sufficient upon which to base such a decision. Therefore, we shall remand the matter so that the Agency may issue a decision in accordance with 29 C.F.R. § 1614.110(b).

CONCLUSION

The Agency's final order is REVERSED, and we REMAND the complaint for further processing in accordance with this decision and the Order below.

ORDER

Within sixty (60) calendar days from the date this decision becomes final, the Agency shall issue a final decision on the merits of the complaint, based on the evidence developed during the EEO investigation and in accordance with 29 C.F.R. § 1614.110(b). A copy of the Agency's final decision must be sent to the Compliance Officer referenced herein.

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

October 11, 2022

Date