



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

[REDACTED]  
Tommy R.,<sup>1</sup>  
Complainant,

v.

Christine Wormuth,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2022001001

Hearing No. 410-2019-00349X

Agency No. ARIMCOMHQ18MAR01069

**DECISION**

On December 12, 2021, 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 November 1, 2021 final order concerning his 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an EEO Specialist and Disability Program Manager, GS-0260-11, at the Agency's USAG Fort Benning EEO Office facility in Fort Benning, Georgia.

On July 5, 2018, Complainant filed an EEO complaint alleging:

1. That the Agency discriminated against him and subjected him to harassment/a hostile work environment on the bases of national origin (Nigerian), sex (male),

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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.

disability, age (58), and reprisal for prior protected EEO activity when, on February 6, 2018, the following occurred:

- a. Complainant became aware EEO Officer and EEO Specialist made statements accusing Complainant of making unauthorized entry into his prior supervisor's office which led to the supervisor's office locks being changed.
  - b. Complainant became aware his prescribed medication and personal items (e.g., professional textbooks and file discs) were missing from the office after he had previously been denied entry to get his items.
  - c. EEO Officer warned Complainant not to remove government property as she watched Complainant remove his personal items from the office, and remarked, "I hope he don't take government property with him," as she passed through the office, in front of EEO Specialist and 2<sup>nd</sup> EEO Specialist's open doors.
2. Complainant claimed he was discriminated against based on race (Black), sex (male), age (58; born 1960), national origin (Nigerian), disability, and reprisal (prior EEO Activity) regarding his termination by EEO Officer and Garrison Commander when they failed to consider Complainant's rights under Agency progressive disciplinary guidelines in the proposed removal letter on August 21, 2017 and the Douglas Factors in final removal decision on February 6, 2018.

The Agency accepted the foregoing claims for investigation. 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 timely requested a hearing.

After a teleconference on March 16, 2021, the AJ assigned to the case determined *sua sponte* that the complaint did not warrant a hearing and issued a decision by summary judgment in favor of the Agency on September 23, 2021. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed the instant appeal. On January 11, 2022, Complainant filed a motion seeking an extension of time to file his appellate brief. The Commission granted Complainant an extension until January 24, 2022. Complainant filed an appellate brief on February 6, 2022.

On appeal, Complainant contends the decisions of the Agency and the AJ should be reversed and remanded. Complainant contends he was not afforded due process.

In support of this, Complainant indicates the Agency and the AJ failed to consider the evidence in the light most favorable to him; the AJ erred in finding he had not shown a prima facie case of discrimination; summary judgment was improper because there are material facts in dispute; the AJ erred in concluding that a hearing or discovery were unlikely to lead to a finding of discrimination, harassment, or hostile work environment; and the AJ erred and abused her discretion in not allowing hearing and discovery to take place and thus denied Complainant due process of law.

The Agency contends on appeal that the decision of the AJ should be upheld as it is fully supported by the evidence in the record, and it was correctly decided. The Agency further asserts that even after being granted an extension, Complainant still failed to timely file his brief and therefore his brief should not be considered.

### ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). However, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given: (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. Id.

Further, EEOC Regulation 29 C.F.R. § 1614.109(g)(3) provides that if the AJ determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue a decision without holding a hearing.

The record supports a finding that the AJ *sua sponte* issued the decision without a hearing in favor of the Agency without providing the parties with adequate notice, as required by 29 C.F.R. § 1614.109(g)(3) and the Commission in Petty. Upon review of the record, the Commission could not find any notice by the AJ of a *sua sponte* proposal to issue a decision without a hearing or a comprehensive statement issued to the parties of the purported undisputed material facts.<sup>2</sup> As such, it appears Complainant was not provided with an opportunity to file a written response opposing the AJ's proposal to issue a decision without a hearing. As such, we determine that the AJ erred in issuing a decision without a hearing without affording Complainant the procedural safeguards required by 29 C.F.R. § 1614.109(g)(3) and Commission precedent. See Gurley v. Dep't of Transportation, EEOC Appeal No. 0120093479 (Mar. 8, 2010).

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the AJ's decision without a hearing and the Agency's final order implementing the AJ's finding of no discrimination. This case is REMANDED for further proceedings in accordance with the ORDER below.

### ORDER

Within thirty (30) calendar days of the date this decision becomes final, the agency shall resubmit Complainant's request for a hearing, a copy of this decision, and a copy of the complaint file to the Hearings Unit of the EEOC's Atlanta District Office. 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.

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<sup>2</sup> We also note the record contains no indication of a motion for summary judgment filed by either the Agency or Complainant.

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 6, 2023

Date