



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Delphia F.,<sup>1</sup>  
Complainant,

v.

Louis DeJoy,  
Postmaster General,  
United States Postal Service  
(Field Areas and Regions),  
Agency.

Appeal No. 2022001600

Hearing No. 451-2020-00133X

Agency No. 4G-780-0222-17

**DECISION**

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 December 28, 2021, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

During the period at issue, Complainant worked for the Agency as a Sales, Services/ Distribution Associate, in San Antonio, Texas.

On December 14, 2017, Complainant filed a formal EEO complaint in which she alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of disability, and in reprisal for prior protected EEO activity when:

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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.

1. Since September 9, 2017, Complainant's request for light duty work accommodation had not been granted.
2. On September 9, 2017, Complainant was sent home after she had disclosed her disability to management and was told her clock rings would be changed.
3. Since September 9, 2017, Complainant's request for advanced annual or sick leave had not been addressed.
4. During November and December 2017, Complainant's request for sick leave under the Family and Medical Leave Act (FMLA) had been changed to leave without pay.

After an investigation into the claims, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing before an AJ. In an Order dated October 30, 2018, the AJ dismissed Complainant's hearing request and dismissed the formal complaint with prejudice, noting that the Order was issued in accordance with Complainant's request.

Complainant filed an appeal. In EEOC Appeal No. 2019001749 (Sept. 10, 2020), we vacated the AJ's dismissal decision and remanded the matter for a hearing. Specifically, the decision found that the AJ erred in dismissing both the hearing request and the complaint itself because Complainant was not withdrawing her complaint but attempting to amend or clarify the complaint. EEOC Appeal No. 2019001749.

Upon remand, on September 24, 2020, the AJ issued an Acknowledgment Order. The Acknowledgment Order, in pertinent part, set forth that:

If Complainant has not already done so, s/he can now access her/his case through the EEOC's secure online system called the **EEOC Public Portal**. The **EEOC Public Portal** (for Complainants) and the **Agency's Federal Sector Portal** (for Agencies) will allow complainants, agencies, and the EEOC to transmit document and communications to each other, as well as view all documents in the case..."

In this order, the AJ also ordered the parties to provide a Preliminary Case Information (PCI) submission. The AJ ordered the parties to submit the PCI within 15 days from the date of the order. The AJ stated that failure to submit the PCI could result in sanctions such as waiver of discovery or denial of motions in the areas addressed in the PCI. The Acknowledgment Order contained attachments for the PCI but did not contain a certificate of service.

On October 14, 2021, the AJ issued an Order Scheduling Initial Conference. Therein, the AJ stated that the parties would have an Initial Conference via telephone on October 25, 2021. The AJ noted that failure to follow this order could result in sanctions. The certificate of service for this order sets forth that it was delivered to both parties via "Fed/SEP Portal."

Also, on October 14, 2021, the Agency issued a Notice of Call in Number for the Initial Conference on October 25, 2021. The certificate of service reflects that this Notice was sent to Complainant via the “FED/SEP Portal.”

On October 25, 2021, the AJ issued an Order to Show Cause and Intent to Sanction. Therein, the AJ set forth that Complainant failed to submit a PCI report as set forth in the September 24, 2020 Acknowledgement Order. The AJ also set forth that Complainant failed to appear at the Initial Conference. The AJ ordered Complainant to respond by November 9, 2021 and stated that failure to respond to the Order may result in sanctions. The certificate of service for this Order reflects that the AJ sent it to both parties via “FED/SEP Portal.”

On November 10, 2021, the Agency filed a Motion for Sanctions. Therein, the Agency requested sanctions noting that Complainant failed to respond to the AJ’s Order to Show Cause. The certificate of service reflects that the Agency sent this Motion to the AJ via the “FED/SEP portal.”

On December 3, 2021, the AJ issued a Sanction Dismissal Order. Therein, the AJ dismissed the instant matter. The AJ set forth that Complainant failed to file the PCI Report, failed to attend the Initial Conference, and did not respond to the Order to Show Cause. The AJ noted that these documents were sent to Complainant via the “portal” and were not returned as undeliverable. The certificate of service reflects that this order was sent to both parties via “FED/SEP Portal.”

The Agency issued a final decision finding no discrimination on December 28, 2021. The certificate of service reflects that the Agency’s final decision was delivered to Complainant via the United States Postal Service.

The instant appeal followed.

### 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 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 the AJ's 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 to 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.

The dismissal of a hearing request as a sanction is only appropriate in extreme circumstances such as willful disobedience of an AJ's orders or unjustifiable failure to respond to those orders. Joey B. v. U.S. Postal Serv., EEOC Appeal No. 2021004116 (Dec. 8, 2022); Clarine L. v. Dep't of Homeland Security, EEOC Appeal No. 2020004391 (Feb. 8, 2022). Examples of conduct warranting dismissal of hearing requests can be found in: Charlie K. v. Dep't of Veteran 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 proceedings, 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 the administrative process and unwillingness to comply with AJ's orders despite warning of consequences).

When a lesser sanction would normally suffice to deter the conduct and to equitably remedy the opposing party, an AJ may be abusing her discretion by dismissing the complaint. See Joey B., supra (dismissal of hearing request rejected on appeal where complainant subsequently found to have complied with AJ's discovery order and where AJ issued confusing and contradictory instructions); 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 complainant's discovery when 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 remained 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), req. for reconsider. den'd, EEOC Request No. 2020002964 (Dec. 29, 2020) (dismissal of hearing request rejected on appeal where complainant made earnest but unsuccessful effort to comply with an onerous acknowledgement and scheduling order).

In more recent cases in which the Commission affirmed the AJ's dismissal of a hearing request, such scenarios are typically characterized by multiple incidents of noncompliance, the complainant's failure to respond to the AJ's show cause order, or the lack of acts or omissions attributable to the AJ or the Agency that resulted in the complainant's noncompliance. See e.g., Melinda H. v. Dep't of Veterans Affairs, EEOC Appeal No. 2021004162 (Oct. 17, 2022). By contrast, in recent cases in which the Commission reversed the AJ's dismissal of a hearing request, we tend to find that there was a single incident of noncompliance, that the complainant timely responded to the AJ's show cause order, and that the noncompliance usually resulted from circumstances beyond the complainant's control, from an oversight that the complainant immediately sought to correct, or where the noncompliance resulted from an act or omission on the part of the AJ or the Agency. See e.g., Stuart M. v. Gen. Serv. Admin., EEOC Appeal No. 2021005010 (Nov. 21, 2022); Sean L. v. Dep't of the Air Force, EEOC Appeal No. 2020002537 (June 2, 2021), req. for recon. den. EEOC Request No. 2021003956 (Oct. 26, 2022).

In the instant matter, in her December 3, 2021 Dismissal Order the AJ identified various incidents of alleged non-compliance: failure to submit the PCI report, failure to appear at the Initial Conference, and failure to respond to the Order to Show Cause. However, the record does not clearly reflect that Complainant *received* the AJ's various orders. The Acknowledgment Order set forth that hearing-related documents would be accessible to Complainant through the EEOC Public Portal and to the Agency through FedSEP. However, the Acknowledgment Order did not contain a certificate of service indicating how this order was delivered to Complainant. In addition, the AJ's other orders (i.e. Order Scheduling Initial Conference, Order to Show Cause), as set forth above, indicate that these orders were sent to Complainant through FedSEP (not through the EEOC Public Portal), to which Complainant did not have access. In addition, the Agency, as set forth above, sent Complainant Notices and Motions (Notice of Call-In Number for the Initial Conference, Motion for Sanctions) through FedSEP, but did not appear to have sent them through the Public Portal. We find that while Complainant's non-compliance may have had the effect of delaying the processing of the complaint, this action was not the fault of Complainant. We find that while there were multiple incidents of non-compliance, they were attributable to the AJ's action in sending orders to Complainant through FedSEP (which complainants and their representatives do not have access to), rather than through the EEOC Public Portal. In the absence of a showing of either willful disobedience or an unjustifiable

failure to respond on Complainant's part, we cannot find that the integrity of the process has been so comprised here as to warrant the severe sanction of a hearing request dismissal.

Accordingly, we VACATE the Agency's final decision and REMAND this matter to the Agency for further action in accordance with this decision and ORDER herein.

### ORDER

The Agency shall submit a renewed request for a hearing on Complainant's behalf, a copy of the complaint file, and a copy of this appellate decision to the EEOC's Hearing Unit for the San Antonio Field Office within thirty days from the date this decision is issued. The Agency shall notify the Compliance Officer of the new hearing number within five days of assignment of the new hearing number. Thereafter, the Administrative Judge shall adjudicate the complaint 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

February 27, 2023  
Date