



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

[REDACTED]
Michael L.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Citizenship and Immigration Services),
Agency.

Appeal No. 2021004712

Agency No. HS-CIS-02688-2018

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 July 19, 2021, final decision 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. The Agency's final decision is VACATED, and the complaint is REMANDED for a hearing.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Management and Program Analyst, GS-0343-14, at the Agency's Office of Citizenship and Application Services in Washington, D.C.

On November 5, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African American), religion (Masonic), color

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.

(dark), disability (mental and physical), age (over 40), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. From January 1, 2017, to August 22, 2018, management pressured him into performing a voluntary Office of Security and Integrity (OSI) related function as Occupant Emergency Floor Warden, he received a derogatory SF-50, he was ostracized, he was embarrassed in front of colleagues when called “a professional eater,” and he was forced to buy his own DVD burner and not given any support; and
2. On September 14, 2018, he was not selected for CIS-10023637-ICS, Supervisory Management Program Analyst-CSPED.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

On July 14, 2020, Complainant emailed the AJ stating his intention to withdraw his complaint for health reasons. Less than one hour later, Complainant’s attorney emailed the AJ apologizing for Complainant’s earlier email and stating that they did not wish to withdraw the complaint. On July 17, 2020, the AJ, citing Complainant’s voluntary withdrawal, dismissed Complainant’s hearing request and ordered the Agency to issue a final decision.

Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ erred in dismissing the hearing request because he provided sufficient evidence that he did not intend to withdraw his hearing request. Complainant maintains that his attorney’s email, submitted within 40 minutes of the request to withdraw, supports the contention that the AJ improperly dismissed the hearing request. In response, the Agency argues that Complainant withdrew his complaint in a clear and unambiguous email to the AJ, which divested the AJ of jurisdiction. The Agency further argues that Complainant’s attorney’s repudiation of the withdrawal is immaterial.

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 Chap. 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 a party fails without good cause shown to respond fully and in a 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 Vet. Aff., 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.

We have consistently held in recent decisions that dismissal of a hearing request as a sanction is only appropriate in extreme circumstances. One such circumstance is when a complainant engages in contumacious conduct. Cassey B. v. Dep’t of Vet. Aff., 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 Vet. Aff., EEOC Appeal No. 2019002293 (September 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 (February 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 a 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).

As can be seen from the foregoing discussion of recent Commission precedent, there must be a showing that Complainant either willfully disobeyed the AJ's orders or unjustifiably failed to respond to those orders in order to warrant dismissal of the hearing request as a sanction. In the absence of either circumstance, we cannot find that the integrity of the 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 or her discretion by dismissing the hearing. See Edward W. v. Soc. Sec. Admin., EEOC Appeal No. 2019005957 (Apr. 15, 2021) (dismissal of hearing request reversed on appeal where AJ dismissed hearing request outright after only one day rather than issue an order to show cause depriving complainant of his opportunity to respond to the agency's motion for sanctions and demonstrate that his responses to its discovery requests were adequate); Georgianne B. v. Dep't of Agric., EEOC Appeal Nos. 0120181591 & 0120181592 (Feb. 27, 2020) (dismissal of hearing request reversed 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 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 complainant made earnest but unsuccessful effort to comply with an onerous acknowledgement and scheduling order).

Here, the AJ did not allege that Complainant disobeyed any orders, failed to respond to any requests, or engaged in non-compliance of any sort. Rather, the AJ dismissed the hearing request based on Complainant's July 14, 2020, email. The record reveals, however, that Complainant, through his attorney, attempted to recant the withdrawal request less than one hour after sending the email and prior to the AJ's dismissal. Specifically, email records show that Complainant emailed the AJ at 8:57 a.m. stating that he wanted to withdraw the complaint due to health reasons.

At 9:36 a.m., Complainant's attorney emailed the AJ stating that after deliberation with Complainant, he would not be withdrawing the complaint. Accordingly, we find the record before us is insufficient to demonstrate that Complainant or his attorney engaged in the kind of willful or obstinate refusal to comply with an AJ's order that typifies contumacious conduct or that he willfully failed to act with due diligence. We find minimal prejudicial effects, minimal delay in justice, and a minimal impact upon the EEO complaint process. We therefore find that the AJ's dismissal of Complainant's hearing request was too harsh a sanction.

CONCLUSION

The Commission VACATES the Agency's final decision and REMANDS the complaint to the Agency for further action in accordance with this decision and the Order herein.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Washington Field Office Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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 hold a hearing 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:



Carlton M. Hadden, Director
Office of Federal Operations

July 17, 2023
Date