



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

[REDACTED]  
Joel P.,<sup>1</sup>  
Complainant,

v.

Kilolo Kijakazi,  
Acting Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 2021004761

Hearing No. 420-2020-00183X

Agency No. ATL-19-0844-SSA

**DECISION**

On August 9, 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 July 12, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Debt Management Specialist, GS-09, in the Agency's Southeastern Program Service Center (SEPSC) in Birmingham, Alabama.

On September 10, 2019, Complainant filed an EEO complaint. On November 7, 2019, the Agency issued its Letter of Acceptance and framed the claims as following, that Complainant alleged that the Agency:

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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. subjected him to a hostile work environment based on age (over 40), and in reprisal for protected EEO activity when on June 4, 2019, through present, in terms of working conditions, non-selection, promotion, detail assignment, and awards;
2. subjected him to disparate treatment based on his age (over 40), sex (male), race (Black), and in reprisal for protected prior EEO activity when on June 4, 2019, Complainant learned he was not selected for promotion for the GS-105-11, Social Insurance Specialist (Debt Specialist Unit Supervisor) position, advertised under Vacancy Announcement #SB-10459575-19-SBG; and
3. subjected Complainant to disparate treatment based on age (over 40), and in reprisal for prior EEO activity when on September 10, 2019, Complainant expressed his allegations of dissatisfaction of the processing and mishandling of his informal complaint.

The Agency dismissed claim 3 pursuant to EEOC regulation 29 C.F.R. § 1614.107(a)(8) for alleging dissatisfaction with the processing of a complaint. The Agency accepted claims 1 and 2 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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing.

On November 13, 2020, the AJ held an Initial Conference. During the Conference, the AJ determined that Complainant was unable to clearly enunciate his hostile work environment claim and both parties expressed confusion on what the claim encompassed. The AJ gave the parties a deadline of November 23, 2020, to meet and confer to clarify the claim and provide a proposed joint statement of claims. The AJ noted that failure to comply could result in sanctions, and further noted that two previous orders explained the risk of sanctions for failing to comply with AJ orders.

On November 16, 2020, the Agency sent Complainant's counsel (Counsel) an email requesting to meet and confer, proposing an initial set of claims and reminding Complainant of the deadline for submission of the joint statement. Agency's Motion to Sanction (Motion) at 4. Counsel responded that same day, indicating that he would confer with his client and respond to the Agency. Motion at 6. Neither Complainant nor Counsel followed up.

On November 23, 2020, the Agency filed a Motion for Sanctions (Motion). The Agency's Motion stated that, in light of Complainant's failure to comply with the AJ's order and meet to confer and establish a joint proposed list of clearly defined claims, the Agency was requesting that the AJ sanction Complainant.

Complainant asserted that Counsel submitted a document at 5:46 p.m. on November 23, 2020, responding to the Agency's Motion. Complainant, through Counsel, claimed that the Motion was premature and that he was still working on a response when he received the Motion. The document also included a list of proposed claims.

Complainant also reasoned that the delay was due to Counsel being in an EEOC hearing between November 19, 2020, and November 21, 2020. Additionally, Complainant requested to amend his complaint to allege discrimination based on his sex, race, age, and prior and ongoing EEO activity when, on or about November 9, 2020, Operations Manager, Process Division 1 SEPSC, suspended Complainant for five days based on his alleged “Failure to Follow a Management Directive”.

On April 16, 2021, the AJ issued a Show Cause Order. The Show Cause Order provided that Complainant had until May 1, 2021, to show cause as to why he should not be sanctioned for failing to comply with the AJ’s November 13, 2020, Order to Meet and Confer.

On May 1, 2021, Complainant responded to the Show Cause Order asserting that he had tried to reach a settlement agreement with the Agency during the relevant time. The record indicated that the settlement discussions occurred between November 12 and 16, 2020, with the Agency declining Complainant’s settlement offer and declining to make a counteroffer. Complainant also reiterated that Counsel was in hearings from November 19 until 21, 2020, and that Counsel was still working on Complainant’s responses when the Agency prematurely filed its Motion.

On May 24, 2021, the AJ issued a Decision and Order Imposing Sanctions, Dismissing Claims, and Dismissing Hearing Request (Decision). In this Decision, the AJ determined that Complainant failed to comply with her November 13, 2020, Order to Meet and Confer (Order). The AJ stated that Complainant’s November 24, 2020, proposed list of claims failed to meet the perimeters of the Order, which was to specifically meet and confer with the Agency and submit a joint list. The AJ stated Complainant’s settlement efforts did not excuse failing to comply with the Order. The AJ also determined that the Agency’s Motion was not premature as it was filed at the end of day, the day the joint statement was due.

The AJ also determined that Complainant had a history of non-compliance with her orders. Specifically, the AJ noted that Complainant did not timely submit Preliminary Case Information, and he failed to meet and confer with the Agency prior to the Initial Conference. Based on Complainant’s history of noncompliance, his non-persuasive arguments, and failure to provide the joint statement as ordered, the AJ dismissed the hearing request as a sanction and remanded the complaint to the Agency for a final decision. In addition, the AJ took into account the “non-alternative sanctions” proposed by the Agency in its Motion and rather than dismissing the entire complaint, the AJ dismissed claim 1, affirmed the Agency’s dismissal of claim 3, and denied Complainant’s Motion to Amend, noting that the claim was not like or related to the any of the claims.

On July 12, 2021, 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 or harassment as alleged with regard to claims 1 and 2 and affirmed the dismissal of claim 3. The instant appeal followed.

### CONTENTIONS ON APPEAL

Complainant requests that the Commission determine that the AJ's sanction was too harsh and vacate the Agency's decision, remand the matter, and allow him to amend his complaint. In support, Complainant argues that the AJ erred and abused her authority. Complainant asserts that Counsel received the Agency's Motion for Sanctions at 4:10 p.m. on November 23, 2020, and that this was clearly premature as Counsel was still working on his part of the joint statement, which he submitted shortly after. Additionally, Complainant argues that if the AJ was going to sanction him, then the Agency should have been equally sanctioned since neither party submitted a joint statement.

In response, the Agency requests that the Commission affirm the Agency's final decision because the Agency properly determined Complainant failed to show by a preponderance of the evidence that the Agency discriminated against or harassed him on the bases of his protected classes or in reprisal.

### STANDARD OF REVIEW

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").

### ANALYSIS AND FINDINGS

#### *AJ's Sanction*

The Commission's regulations afford broad authority for the conduct of hearings by Administrative Judges. See 29 C.F.R. § 1614.109 et seq.; Rountree v. Dep't of Treasury, EEOC Appeal No. 07A00015 (July 17, 2001). When a complainant or agency fails to comply with an AJ's order, an AJ may take action against the noncomplying party pursuant to 29 C.F.R. § 1614.109(f)(3), up to and including issuing a decision in favor of the opposing party. See 29 C.F.R. § 1614.109(f)(3)(iv). Sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. See Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000). A sanction may be used to deter the noncomplying party from similar conduct in the future, as well as to equitably remedy the opposing party. *Id.*

Specifically, our regulations provide that where a party, inter alia, fails to respond to an order of an AJ, the AJ may, as appropriate, take action against the non-complying party pursuant to 29 C.F.R. § 1614.109(f)(3), i.e., an AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate, e.g., payment of costs and expenses by the non-complying party. Id.

Our 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 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). Several factors are considered in tailoring a sanction and determining if a particular sanction is warranted: (1) the extent and nature of the non-compliance, and 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; and (4) the effect on the integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (Mar. 1, 2007).

As to the fifth factor, 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 (March 10, 2020). Examples of contumacious conduct warranting dismissal of hearing requests include: Charlie K. v. Dep't of Vet. Aff., 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 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).

There must be a showing that Complainant either willfully disobeyed the AJ's orders or unjustifiably failed to respond to those orders 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 her discretion by dismissing the hearing. See Edward W. v. Soc. Sec. Admin., EEOC Appeal No. 2019005957 (April 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).

With the foregoing considerations in mind, we find that Complainant's response to the AJ's Show Cause Order demonstrated his and Counsel's attempts to timely comply with the AJ's November 13, 2020 Order. Although the Agency argued that Complainant failed to timely correspond with the Agency, the record indicates that both parties were in communication about the case, including attempts to settle the matter. Upon review, we find that there is no evidence that Complainant had engaged in or exhibited the kind of willful or obstinate refusal to comply with an AJ's orders that typifies contumacious conduct and was clearly present in Charlie K., and Cleo S.

With regard to the alleged noncompliance history, assuming, arguendo, that Complainant failed to comply with the AJ's prior orders, he did make attempts to comply with the AJ's November 13, 2020, Order, which was the focus of the Show Cause Order. Here, the Agency's sanctions request focused on Complainant's sole action of not timely meeting with the Agency to confer on a joint list of claims. Based on the record, we find, as we did in Georgianne B., and Drucilla Y., that the overall integrity of the EEO process had not been compromised so severely by Complainant's behavior as to warrant imposition of the ultimate sanction -- dismissal of Complainant's hearing request. Rather, the worst that could be said about Complainant is that he was negligent in failing to timely respond to the Agency about when or how to submit one joint list of claims to the AJ.

Furthermore, we find that the AJ "sanctioned" Complainant by dismissing claim 1. We find that the AJ's dismissal of claim 1 was also excessive as it precluded Complainant from being able to bring forth any evidence of discrimination and was not based on our regulations found at 29 C.F.R. § 1614.107(a). Therefore, we reverse the AJ's dismissal of claim 1.

With regard to claim 3, we find that the Agency properly dismissed this claim pursuant to 29 C.F.R. § 1614.107(a)(8) as a spin-off complaint.

Finally, we note that the AJ denied Complainant's request to amend his complaint. We note that Complainant later filed a separate EEO complaint on this matter, which is currently pending a separate appeal before the Commission in EEOC Commission Appeal No. 2023003450.

We therefore determine that the AJ's dismissal of Complainant's hearing request and dismissal of claim 1 were too harsh a sanction under the specific circumstances presented here.

### CONCLUSION

The Commission VACATES the Agency's final decision and REMANDS claims 1 and 2 of the complaint to the Agency for further action in accordance with this decision and the Order herein. The dismissal of claim 3 is AFFIRMED.

### ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Birmingham District Office's Hearings Unit, within 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 Birmingham District Office Hearings Unit. Thereafter, the Administrative Judge shall 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 (Q0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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

June 28, 2023

Date